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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-6531

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,
vs.
RICHARD BERT MOSLEY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

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WO. 2-8745—WO. 2-8732

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No. .....

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Now Comes William L. Cahalan, Prosecuting Attorney in and for the County of Wayne, State of Michigan, by Patricia J. Boyle, Chief Appellate Attorney, and Thomas M. Khalil and Robert A. Reuther, Assistant Prosecuting Attorneys and prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Michigan entered in the above-entitled cause on August 28, 1974.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals, Division I, is reported at 51 Mich App 105; 214 NW 2d 564 (1974), and is appended as Appendix "A." Application for rehearing by the Petitioner in the Michigan Court of Appeals was denied on March 11, 1974, and said order is appended as Appendix "B." Application for leave to appeal to the Michigan Supreme Court by the Petitioner was denied on June 27, 1974, and said order, entered on June 28, 1974, 392 Mich 764, is appended as Appendix "C." Application for rehearing of the denial of leave to appeal was denied on August 28, 1974, and said order is appended as Appendix "D."

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered January 14, 1974. Application for rehearing was denied on March 11, 1974. Application for leave to appeal to the Michigan Supreme Court was denied on June 28, 1974. Application for rehearing was denied on August 28, 1974, the date Petitioner exhausted his state remedies. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

I.

Whether and under what circumstances a defendant may waive his Miranda rights subsequent to an election to remain silent.

II.

Whether a defendant's election to remain silent *vis a vis* one crime, robbery, precludes the waiver by him of his Miranda rights *vis a vis* another crime, murder, when the investigation regarding these crimes is being conducted by two separate bureaus of the same police department.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision which the present petition involves is the Fifth Amendment to the United States Constitution which provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense or be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF FACTS

Defendant, Richard Bert Mosley, was convicted of the First Degree Murder of one Leroy Williams. Certain admissions made by defendant after he was arrested were used against him at trial.

Defendant was arrested at 1:05 P.M. on April 8, 1971 in connection with certain robberies that had occurred on Detroit's lower east side (Ev. H. 12).[1]

Detective Cowie of the Armed Robbery Bureau informed defendant of his Miranda rights on the fourth floor of Police Headquarters after he was arrested. Defendant signed a Constitutional Rights Certificate of Notification acknowledging the giving of those rights, and he stated that he completely understood his rights (Ev. H. 12, 18-20, 72, 78).

Detective Cowie talked with defendant for only twenty minutes and the questioning ceased when defendant declined to talk about the robberies. At no time did defendant ever request an attorney pursuant to the rights contained in the Miranda warnings (Ev. H. 20, 22, 78).

Detective Cowie terminated the questioning *vis a vis* the robberies at about 4:00 P.M., whereupon defendant was taken to the ninth floor cell block and was not seen further by Cowie (Ev. H. 24).

Thereafter, at about 6:20 P.M. the defendant was taken from the ninth floor cell block to the fifth floor Homicide

[1] References prefaced by Ev. H. refer to the pages in the pretrial evidentiary hearing held to determine the admissibility of defendant's admissions.

Bureau by Homicide Detective Gilbert Hill (Ev. H. 82, 87). Detective Hill saw defendant to interrogate him regarding the robbery-murder of one Leroy Williams (Ev. H. 82). At that time defendant was advised a second time of his Miranda rights by Detective Hill. Defendant again indicated that he understood his rights and at no time requested counsel (Ev. H. 89-108). Defendant executed a second signed Miranda Rights form (Ev. H. 90-94). Defendant thereafter made admissions that implicated him in the murder of one Leroy Williams (Ev. H. 94-95).

Defendant testified at the pretrial evidentiary hearing concerning his admissions and admitted that he had signed the Miranda Rights form. He also stated that he read his rights prior to signing the notification form. Defendant also admitted that, indeed, Detective Hill had explained to him the five points in the Miranda Rights form prior to his signing same (Ev. H. 150).

Defendant also stated that the reason he confessed was due to the fact that Detective Hill told him a co-felon had put all the blame on defendant (Ev. H. 152-154) and not because he was forced to or because he did not understand his rights or because he had been denied an attorney.

The trial judge held the admissions admissible and they were used against him at trial.

Defendant's conviction was reversed by a three-judge panel of the Michigan Court of Appeals, Division 1, under date of January 14, 1974. The opinion of the Michigan Court of Appeals is reported at 51 Mich App 105; 214 NW 2d 564 (1974). The Michigan Court of Appeals found that defendant was in fact twice apprised of his Miranda Rights by the two detectives involved in the case.

However, the Michigan appellate court held that, based on the dictates of *Miranda* v *Arizona*, 384 US 474 at 473-474; 76 S Ct 1602 at 1627-1628; 16 L Ed 2d 694 at 723 (1966), interrogation of defendant in this case should have ceased when defendant declined to answer Detective Cowie's questions. The Michigan court also held that the interrogation in this case violated the dictates of Mirandas' companion case, *Westover* v *United States*, 384 US 494; 86 S Ct at 1638; 16 L Ed 2d at 735 (1966); *People* v *Mosley*, 51 Mich App 105, 107-108, 214 NW 2d 564 (1974).

The Petitioner then timely filed an application for rehearing under date of February 1, 1974. Said application for rehearing was denied by the Michigan Court of Appeals on March 11, 1974.

The Petitioner, thereafter, timely filed an application for leave to appeal to the Supreme Court of the State of Michigan under date of March 29, 1974.

The Supreme Court of Michigan denied the application for leave to appeal, six of the seven justices sitting, on June 28, 1974. One justice dissented from the denial of leave to appeal at 392 Mich 764.

The Petitioner then timely filed an application for reconsideration of the application for leave to appeal under date of July 17, 1974. Said application for reconsideration was denied under date of August 28, 1974.

REASONS FOR GRANTING THE WRIT

The questions presented by Petitioner are substantial Federal Constitutional issues which have yet to be addressed by this Court and which have been erroneously answered by the courts of Michigan. The within Petition presents precisely and unequivocally the questions of whether a defendant may subsequently waive his right to remain silent after initially invoking it; and whether the invocation of the right to remain silent regarding one crime, robbery, precludes waiver of that right regarding another crime, murder.

The facts contained in the record are, on the points raised in this petition, not in dispute. The questions raised herein are solely questions of law, thus presenting this court with an excellent record upon which to decide the significant questions posed by Petitioner.

The Michigan courts held that despite the fact that defendant was informed of his Miranda rights prior to the questioning by the two detectives, *no* questioning should have been initiated subsequent to defendant's invocation of his right to remain silent—irrespective of the repetition of the Miranda rights and the second waiver, and irrespective of the fact that defendant did not request counsel.

Such a holding, the Petitioner claims, is in direct conflict with the Miranda rule and the dictates of *Westover v United States*, 384 US at 494; 86 S Ct at 1638; 16 L Ed 2d at 735 (1966), a companion case to Miranda.

The Miranda rule, the Petitioner maintains, does not and should not preclude the police from questioning a sus-

pect who has knowingly and intelligently waived his constitutional rights.

The fact that a defendant previously chose to remain silent does not and should not *ipso facto* lead to the conclusion that that defendant can never subsequently waive his Miranda rights. The Michigan courts, however, have reached that result through an erroneous application of the Miranda rule to cases such as the instant one.

The proper reading of Miranda, the Petitioner asserts, permits a defendant to indeed waive his rights, previously invoked, as long as said rights are knowingly, intelligently, and voluntarily waived. Such a conclusion is provided for in the Miranda case itself. *Miranda v Arizona,* 384 US 474, 475; 86 S Ct 1602, at 1628; 16 L Ed 2d 694 (1966).

Moreover, the Michigan courts, in reliance on *Westover* v *United States, supra,* held that the second interrogation by Detective Hill of the Homicide Bureau was not permissible since defendant had not been removed in time or place from the surroundings of Detective Cowie's interrogation, irrespective of the fact that the second inquiry was in regard to a separate crime—murder—and irrespective of the fact that Detective Hill first advised defendant of his rights and defendant signed a waiver of his rights.

Such a result, the Petitioner claims, offends the rules of *Miranda* and *Westover* and is erroneous on its face.

In *Westover* no warnings were given to the defendant therein by the local police prior to his being questioned by the F.B.I. and no evidence of any waiver of constitutional rights was proffered. The instant case does not fall within the rule of *Westover* and therefore the holding of the Michigan courts is not in accord with the decision of this Court.

Indeed, fact situations such as the instant one are specifically allowed for in *Westover* where it is stated that

> "We do not suggest that law enforcement authorities are precluded from questioning any individual who has been held for a period of time by other authorities and interrogated by them without appropriate warnings. A different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them." 384 US at 496.

The Petitioner also claims in this Honorable Court that the holding of the Michigan tribunals effectively prevents a metropolitan police department from interrogating a defendant concerning separate and distinct crimes, if the defendant initially invokes his right to remain silent as to the first crime, irrespective of the giving of additional warnings regarding a second crime, and irrespective of a knowing, intelligent and voluntary waiver of his rights. That a metropolitan police department could not question the instant defendant concerning separate crimes, even when appropriate warnings were given, is not within the contemplation of *Miranda* and *Westover,* the Petitioner claims.

CONCLUSION

It is respectfully submitted that for the reasons outlined above, the decision of the Michigan courts is in conflict with the Miranda and Westover rules laid down by this Court such that plenary review should be granted in this Court and Petitioner's request for a Writ of Certiorari should be granted.

Respectfully submitted,

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PATRICIA J. BOYLE
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APPENDIX A

OPINION OF THE MICHIGAN COURT OF APPEALS, DIVISION I

(People of the State of Michigan, v Richard Bert Mosley)
(No. 14318)

(Filed January 14, 1974)

Before: Danhof, P.J., Fitzgerald and Walsh, JJ.

Danhof, P.J.

Defendant was charged in a one-count information with the offense of murder in the first-degree committed during the perpetration of a robbery. MCLA 750.316; MSA 28.-548. From a jury verdict of guilty as charged, and from a mandatory sentence of life imprisonment, defendant appeals. We are compelled to reverse.

Of the many issues raised by defendant on appeal, we find one dispositive. Prior to trial, defendant moved to suppress as evidence in the case a statement taken by police from defendant on the date of his arrest. This statement was reduced to writing and signed by defendant. The statement thoroughly implicates defendant in the death of one Leroy Williams. As evidentiary hearing was had and defendant's motion to suppress was denied. At trial, the statement was admitted into evidence and read to the jury.

By *People* v *Robinson,* 386 Mich 551; 194 NW2d 709 (1972), we are required to examine the entire record and make an independent determination on the issue of voluntariness. Our review of the record of the *Walker* hearing

in the instant case reveals that defendant was arrested by Detroit police officers without a warrant at approximately 1:05 p.m. on April 8, 1971. At approximately 2:15 p.m., Officer James Cowie began questioning defendant on possible involvement in a series of robberies that had occurred on the city's lower east side. The testimony of Cowie reveals that defendant was informed of his rights in conformity with *Miranda* v *Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). According to Cowie, defendant did not request counsel, but did decline to answer "any questions about the robberies." Thereafter the interrogation of defendant ceased for a time and defendant was handed over to Sergeant Gilbert Hill for further questioning.

Sergeant Hill testified that defendant was again informed of his rights, but that defendant did not request counsel. Hill questioned defendant on his involvement in the robbery-murder of Leroy Williams and defendant denied being implicated. However, when confronted with the statement of an accomplice implicating defendant, defendant confessed at approximately 6:30 p.m. on April 8, 1971.

When defendant declined to answer Cowie's questions, thus indicating that he wished to exercise his Fifth Amendment right to remain silent, the interrogation should have ceased:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege

> cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." *Miranda, supra,* 384 US at 473-474; 86 S Ct at 1627-1628; 16 L Ed 2d at 723.

In referring to the above language at the *Walker* hearing, defense counsel argued that *Miranda* cannot be circumvented by the simple expedient of shuttling a person from one police officer to another for purposes of questioning and thus justifying subsequent interrogations after an election to remain silent. We agree.

The people argue that defendant was arrested initially for unrelated crimes and that he was not questioned by Officer Cowie on the death of Leroy Williams. This may be true, although Cowie testified that defendant was arrested following an anonymous phone call which specifically implicated him in the death of Leroy Williams as well as other robberies. The fact remains that prior to arraignment, *and without being removed in time or place* from the surroundings of Cowie's interrogation, defendant was questioned further by Sergeant Hill after defendant had indicated to Cowie that he wished to remain silent. That this practice is not permitted is made clear by the companion case in *Miranda, Westover* v *United States,* 384 US at 494; 86 S Ct at 1638; 16 L Ed 2d at 735.

Reversed and remanded for new trial with instructions that defendant's confession be suppressed as evidence.

APPENDIX B

ORDER OF THE MICHIGAN COURT OF APPEALS DENYING APPLICATION FOR REHEARING

(State of Michigan—Court of Appeals)

(Filed March 11, 1974)

At a Session of the Court of Appeals of the State of Michigan, Held at the Court of Appeals in the City of Lansing, on the 11th day of March in the year of our Lord one thousand nine hundred and seventy-four.

Present: The Honorable Robert J. Danhof, Presiding Judge; John Fitzgerald, Daniel Walsh, Judges.

In this cause an application for rehearing has been filed by Plaintiff-Appellee and an answer in opposition thereto having been received, and due consideration thereof having been had by the Court,

It Is Ordered that the application for rehearing be, and the same is hereby Denied.

Judge Fitzgerald not participating.

State of Michigan—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 11th day of March in the year of our Lord one thousand nine hundred and seventy-four.

/s/ Ronald L. Dzierbicki,
Clerk.

APPENDIX C

ORDER OF THE MICHIGAN SUPREME COURT DENYING APPLICATION FOR LEAVE TO APPEAL

(State of Michigan—Supreme Court)

(Filed June 27, 1974)

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 27th day of June in the year of our Lord one thousand nine hundred an seventy-four.

Present: The Honorable Thomas M. Kavanagh, Chief Justice; Thomas G. Kavanagh, John B. Swainson, G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, Associate Justices.

On order of the Court, the application for leave to appeal is considered, and the same is hereby Denied, because the appellant has failed to persuade the Court that the question presented should be reviewed by this Court.

Coleman, J., would grant leave.

J. W. Fitzgerald, J., not participating.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereto set my hand and affixed the seal of said Supreme Court at Lansing, this 28th day of June in the year of our Lord one thousand nine hundred and seventy-four.

/s/ Corbin R. Davis,
Deputy Clerk.

APPENDIX D

ORDER OF THE MICHIGAN SUPREME COURT DENYING APPLICATION FOR RECONSIDERATION OF DENIAL OF LEAVE TO APPEAL

(State of Michigan—Supreme Court)

(Filed August 28, 1974)

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 28th day of August in the year of our Lord one thousand nine hundred and seventy-four.

Present: The Honorable Thomas M. Kavanagh, Chief Justice; Thomas G. Kavanagh, John B. Swainson, G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, Associate Justices.

On order of the Court, the motion by plaintiff and appellant for reconsideration of this Court's order of June 27, 1974, is considered and the same is hereby Denied, because it does not appear that said order was entered erroneously.

J. W. Fitzgerald, J., not participating.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 28th day of August in the year of our Lord one thousand nine hundred and seventy-four.

/s/ Corbin R. Davis,
Deputy Clerk.

Supreme Court, U. S.
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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-653

MICHIGAN,

Petitioner,

v.

RICHARD BERT MOSLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

PETITION FOR CERTIORARI FILED NOVEMBER 26, 1974
CERTIORARI GRANTED JANUARY 20, 1975

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IN THE

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MICHIGAN,

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Respondent.

DOCKET ENTRIES

1971

Apr. 10. First Degree Murder Warrant issued against defendant Mosley and he is arraigned on same in Detroit's Recorder's Court.

Apr. 15. Preliminary Examination held in open court and defendant is ordered held for trial on First Degree Murder Charge.

1972

Feb. 2. Evidentiary Hearing held on defendant's motion for suppression of confession before Judge Henry L. Heading. Cause continued to February 3, 1972.

Feb. 3. Evidentiary Hearing on defendant's motion to suppress confession continued. Cause adjourned to February 4, 1972.

Feb. 4. Evidentiary Hearing continued as to defendant Richard Bert Mosley. Motion for Suppression of Confession heard and taken under advisement.

Feb. 7. Motion to Suppress Confession previously heard and taken under advisement is now denied by the Court. The Court finds Richard Bert Mosley's confession to be free and voluntary and holds same admissible in evidence.

Mar. 27. Voir Dire and empanelling of Jury in progress. Court orders cause continued to March 28, 1972.

Mar. 28. Jury is empanelled and sworn and the evidence is heard in part. Court orders cause continued to March 29, 1972.

Mar. 29-31. Jury hears further evidence in the case. Court orders cause continued to April 3, 1972.

Apr. 3. Jury hears conclusion of the evidence and cause continued to April 4, 1972.

Apr. 4. Jury retires to consult upon their verdict, and not having agreed upon a verdict, the Court orders cause continued to April 5, 1972.

Apr. 5. Jury continues to deliberate and after a time say upon their oath that they find defendant Richard Bert Mosley Guilty of Murder in the First Degree.

May 23. Defendant filed a Claim of Appeal in the Michigan Court of Appeals.

1974.

Jan. 14. The Michigan Court of Appeals reversed defendant Mosley's conviction.

Mar. 11. The Michigan Court of Appeals denied the prosecution's application for rehearing.

June 27. The Michigan Supreme Court denied the Prosecution's Application for Leave to Appeal.

Aug. 28. The Michigan Supreme Court denied the Prosecution's Application for Rehearing.

Nov. 26. The Prosecution's Petition for a Writ of Certiorari was filed in the United States Supreme Court.

1975

Jan. 20. The Prosecution's Petition for Writ of Certiorari was granted.

EXCERPTS FROM TRANSCRIPT OF EVIDENTIARY HEARING HELD ON DEFENDANT'S MOTION TO SUPPRESS CONFESSION

VOLUME NO. I

(Session of February 2, 1972)

• • • • •

(I-11) JAMES COWIE, a witness called on behalf of the People, having been first duly sworn by the Court Clerk, was examined and testified upon his oath as follows:

• • • • •

(12) *Direct Examination*

By Mr. Tatken:

Q. What is your name?

A. James Cowie.

Q. Where are you employed?

A. The Armed Robbery Section of the Detroit Police Department.

• • • • •

Q. And on April the 8th, 1971, did you have occasion to arrest one Richard Bert Mosley?

A. Yes, sir.

Q. Where did you arrest him?

A. In front of his residence, at 3569 Hillger, in the City of Detroit.

Q. What time?

A. It was at 1:05 p.m. on April the 8th, 1971.

Q. What information did you have that prompted you to arrest Richard Bert Mosley on that particular date?

A. It was some time during the first week in April, got an anonymous phone call from—that—and the party gave me the name of several persons that were operating on

the lower east side, holding up places and that, and the name of Richard Mosley and another party—two other men, I (13) believe,—that the information was that they had held up—

Q. What were the names of the other men?

A. An Anthony Smith, and I believe the other name was Charles Little.

Q. Was there anyone else mentioned by this anonymous party?

A. Yes, there was. An Ernest Thompson and a Richard Christian.

Q. Now, did this anonymous party mention anything, other than generally, any specific places that any of these men might have held up?

A. Yes.

Q. And what were they?

A. One was the Blue Goose Bar on Mack, about a block from Hillger.

Q. Can you recall any others?

A. And the other was the Leroy Williams.

Q. Now, when you say Leroy Williams, what do you mean by that?

A. That's—the holdup was supposed to have taken place in the first week or so of January, 1971, outside of a bar, the 101 Ranch Bar; they call it the 101 Ranch or the Hillger Bar there.

Q. And was this Leroy Williams allegedly held up in front of that bar?

A. Yes.

Q. Did you have any other police information re the disposition of Leroy Williams, outside of the alleged holdup?

(14) A. No, sir.

Q. Did anything else happen to Leroy Williams, according to police information, other than the holdup?

A. He was killed.

• • • • •

(16) Q. (By Mr. Tatken): Now, Sergeant Cowie, where were you when you received this telephone call?

A. At work.

Q. And that would be at work at the Robbery B & E Bureau of the Detroit Police Headquarters?

A. Yes, sir.

• • • • •

Q. Oh, I see. But the party that called you didn't identify himself by legal name or any nickname, is that correct?

A. No, sir.

Q. Had you ever heard his voice before?

A. Not that I could recall.

• • • • •

(17) Q. You didn't have any warrant for the arrest of Richard Bert Mosley, did you?

A. No, sir.

• • • • •

Q. After you placed him under arrest, where did you take him?

A. To the 4th floor of police headquarters.

Q. Of police headquarters?

A. Yes, sir.

• • • • •

Q. (By Mr. Tatken): You took him down to the Robbery B & E Bureau, correct?

A. Yes, sir.

Q. What did you do in relation to Richard Bert Mosley once you got him down to the Robbery B & E Bureau?

(18) A. He was advised of his constitutional rights.

Q. And can you recall approximately what time he was advised of his constitutional rights?

A. Not without the benefit of my papers, original papers.

Q. What am I showing to you right now?

A. This is a Constitutional Rights Certificate of Notification.

Q. Have you ever seen that before; that particular one?

A. Yes, sir. This was the one that was read and signed by Mr. Mosley, and the one that he was given the opportunity to read, and that he understood, and that was on April the 8th, 1971, at 2:30 p.m. And signed by Mr. Mosley and signed by myself.

Q. All right. Now, did you read to him the various rights that are contained on that particular form?

A. Yes, sir.

Q. And did you ask him whether he understood those rights?

A. Yes, sir.

• • • • •

Q. (By Mr. Tatken): What specifically did you say? What advice (19) did you give him, if anything?

A. The Constitutional Rights Form was read and explained to the defendant.

Q. All right. And would you tell this Court what specific rights you read to him?

A. That he has a right to remain silent. That he does not have to answer any questions put to him by myself, or make any statements. That any statement that he makes, or anything that he says, can be used against him in a

Court of Law. That he has a right to an attorney present before and during the time that he is talking to me, answering any questions or making any statements. And if he could not afford an attorney, one would be appointed for him without cost, by the Court, prior to any questioning. And he can exercise his right at any time not to answer any questions or make any statements.

Mr. Ziemba: May the record reflect that the witness apparently has read his last answer from a form which he holds in his hand, your Honor. If that is the case. I think it is.

Mr. Tatken: I have no objection to that.

The Court: All right, the record will so show.

Mr. Ziemba: Thank you.

(20) Q. (By Mr. Tatken): Now, so you read to him the rights that are contained on that Certificate of Notification that you are holding in your hand?

A. Yes, sir.

Q. And did you ask him to sign that particular form?

A. I asked him to also read it.

Q. Did he read it?

A. Yes.

Q. Did he ask you for any explanation of his rights?

A. No. He stated he completely understood them.

Q. And did he sign that form in your presence?

A. Yes, sir.

Q. Now, what were you about to question him about?

• • • • •

(22) *Direct Examination* (Continued)

By Mr. Tatken:

Q. Now, Sergeant Cowie, after you advised the defendant Mr. Mosley of his constitutional rights, what were you seeking to question him about, or specifically, what questions did you ask him?

A. I talked to Mr. Mosley in regards to several robberies that had been committed in the lowest east side, out around the vicinity of Mack and the Hillger area.

Q. Were you questioning him at all about the alleged robbery and murder at the 101 Ranch Bar at 3401 Hillger, in the City of Detroit, allegedly occurring on January 9, 1971?

A. No, sir.

Q. Now, did he at any time during that questioning request an attorney?

A. No, sir.

Q. Did he make any comment to you at all regarding your questioning? Not necessarily in regards to the answer to those questions, but other than asking for or the lack of asking for an attorney?

Let me rephrase that question.

You say he didn't ask for an attorney during the questioning, is that correct?

A. No, sir, he did not.

Q. Did he ask to call his family?

(23) A. No, sir.

Q. Did he ask to call anyone?

A. No, sir.

Q. Did he answer your questions about these alleged holdups on the lower east side?

A. Yes, sir.

• • • • •

Q. (By Mr. Tatken): Did the questioning terminate at some time?

A. Yes, sir.

Q. How did the questioning terminate?

A. I notify (sic) Sergeant Hill that I would like to turn him over to him for questioning in regards to the Leroy Williams case.

Q. And you didn't question him at all on the Leroy Williams case, is that correct?

A. No, sir, I did not.

(24) Q. Now, what time did you start questioning Mr. Mosley?

A. It was around 2:30 in the afternoon.

Q. What time did you finish with him?

A. It would have been before 4 o'clock. Around 4 o'clock.

Q. Now, did you make any promises to him in return for the testimony—strike that—the statement that he might give to you, or any other officer, about the holdup murder at the Ranch Bar—101 Ranch Bar at 3401 Hillger, in the City of Detroit, on January 9, 1971?

A. No, sir, I did not.

Q. Did you physically mistreat him in any way?

A. No, sir.

Q. And about 4 o'clock did you turn him over to officers from the Homicide Bureau for questioning?

A. Yes, sir.

Q. Did you physically take him to the Homicide Bureau?

A. No, sir. He was placed on the 9th floor.

Q. So at about 4 o'clock he was placed on the 9th floor, something like that?

A. Approximately, yes.

Q. And did you contact Homicide to indicate that he had been arrested and was on the 9th floor, and you had questioned him?

A. Yes, sir.

Q. Who did you speak to at Homicide, if you can recall?

(25) A. Sergeant Hill.

Mr. Tatken: I have no further questions. You may cross examine.

Mr. Ziemba: Thank you, your Honor.

— — —

Cross Examination

By Mr. Ziemba:

• • • • •

Q. Can you tell the Court, sir, when it was that you received this anonymous telephone call of which you spoke?

(26) A. It was some time during the first week in April. It was either the date—it could have been the day before that we made the arrest. This I can't be too sure of, Mr. Ziemba.

Q. But it was on some date—it was on some day prior to April 8th of 1971?

A. Yes.

Q. Do you recall at all, Sergeant Cowie, what time of the day you received this telephone call?

A. It would have been between 8 in the morning and 4 in the afternoon, because I was working days.

Q. And it could have been a day or more before April 8th?

A. It could have been, yes.

Q. I take it you made no record, in terms of notes or anything, of that telephone conversation?

A. No, sir.

Q. At the conclusion of your conversation with this anonymous telephone caller, did you apply to any judge or magistrate for a warrant of arrest for Mr. Mosley?

A. No, sir.

Q. For what offense specifically did you arrest Mr. Mosley at 1:05 p.m. or thereabouts on April 8th of 1971?

A. For investigation of the robbery armed of the Blue Goose Bar and the White Tower Restaurant on Mack.

Q. Was the White Tower Restaurant mentioned to you during your (27) telephone conversation with this anonymous caller?

A. Yes.

Q. And the Blue Goose Bar also?

A. Yes.

Q. Would it be fair to say, Sergeant Cowie, that you arrested on April 8th, 1971, solely and exclusively on the information that you received from this anonymous telephone caller?

A. Yes.

• • • • •

(31) Q. But the question is, why did you not request a warrant for Mr. Richard Mosley?

A. Because it was learned that he wasn't involved in the robbery armed of the Blue Goose Bar.

Q. All right. And is that the same reason why you did not apply for a warrant of arrest for Mr. Richard Mosley in connection with the armed robbery of the White Tower Restaurant?

A. No, sir.

Q. What was the reason, sir?

A. At approximately 4 o'clock he was turned over to Sergeant Hill.

Q. Well, the question is, sir,—the question is, sir, why did you not apply at 2:15 p.m., after you arrived at police headquarters, for the warrant for Mr. Richard Mosley for the armed robbery of the White Tower Restaurant, at 2:15?

A. At 2:15 I hadn't had time to talk to him.

Q. Well, did you feel that you needed more information, before you could apply for a warrant for the armed robbery of the White Tower Restaurant?

A. Yes.

Q. Now, there is no question, is there, Sergeant Cowie, that between 2:15 p.m. on April 8th and the hour of, say, 4 p.m. (32) or 4:30, you did not take Mr. Mosley before any judge in any court?

A. No, sir, I did not.

Q. Was there anything which would have physically prevented you from taking Mr. Mosley before some judge in the Recorder's Court between the hour of 2:15 p.m. and say 4 p.m. or 4:30, on April 8th of 1971?

• • • • •

(33) A. I still don't understand by physically.

Q. Taking him and walking him over?

A. No, sir.

Q. You could have done that if you wanted to, is that right? (34) Presented him to a judge?

A. It was physically possible.

Q. Why didn't you do that, sir?

A. Because I hadn't completed the investigation at 2:30.

• • • • •

Q. I take it that Mr. Richard Mosley made a categorical denial of participating in any of the robberies about which you questioned him?

A. I think at that time he declined to answer whether he had been involved.

Q. He declined to answer?

(35) A. Yes. Anything about the robberies.

Q. For what period of time did you question Mr. Richard Mosley on the occasion of which you speak?

A. Including filling out the necessary arrest papers and that, it couldn't have been more than fifteen or twenty minutes.

Q. Is that fifteen or twenty minutes—

A. That would have brought—

Q. —after 2:15?

A. After 2:30.

Q. After 2:30?

A. It was probably some time between — around 3 o'clock.

Q. Did you answer to one of the prosecutor's questions that you finished talking to Mr. Williams (sic) at 4 p.m. or thereabouts?

A. Yes, sir.

Q. Was that correct?

A. There was another party involved in the arrest that afternoon, and that was—

Q. I speak of Mr. Richard Mosley, sir.

A. That's when I finished talking to Mr. Mosley, yes. That I was through with him.

Q. Yes. You started at more or less 2:30 with Mr. Mosley?

A. Yes.

Q. And you finished at 4 p.m., is that right?

A. Now, you mean talking continuously to him?

(36) Q. Well, this is what I am trying to determine. To him.

A. No, I didn't talk continuously from 2:30 till 4 to Mr. Mosley alone.

Q. All right. Now, how much time was devoted, sir, to your questioning of Mr. Mosley?

A. From 2:30 till approximately—it was approximately twenty minutes.

Q. Say to more or less 3 o'clock, would that be fair?

A. The first time I talked to him, yes.

Q. Now, you talked to him a second time before 4:30, or before 4 o'clock?

A. I believe I did, yes.

Q. Who was the other person to whom you were talking between 2:30 and 4 p.m.?

A. Anthony Smith.

Q. Now, were you talking to these two individuals in their—each other's presence, were they both present at the time you spoke to each?

A. No.

Q. You spoke to Mr. Smith separately from your speaking to Mr. Mosley?

A. Yes.

Q. So that Mr. Mosley didn't hear what you had asked Mr. Smith, is that right?

A. That's right.

(37) Q. And Mr. Smith didn't hear what you asked Mr. Mosley?

A. That's right.

• • • • •

Q. Now, was it during your first conversation between the hours of 2:30 and 4, or during your second conversation during the hours of 2.30 to 4 that Mr. Mosley declined to answer questions?

A. The first.

Q. And did Mr. Mosley answer any questions during your second questioning of him between these hours?

A. The second time that I talked to Mr. Mosley was just to inform him that I was turning him over to the Homicide Bureau and Sergeant Hill.

Q. Did you talk to Sergeant Hill personally concerning your turning Mr. Mosley over to him?

(38) A. I believe I did, yes.

Q. Did you tell Sergeant Hill that Mr. Mosley had refused to answer your questions?

A. No, I didn't. I don't believe I did.

The Court: What was the answer? You say you believe you did?

The Witness: I don't believe I told him that he was—

The Court: Oh.

The Witness: —had refused to answer my questions, no.

Q. (By Mr. Ziemba): What did you tell him?

A. I didn't say he refused. He just declined.

Q. I beg your pardon?

A. He didn't refuse to answer, he declined to answer any questions.

Q. Is this what you told Mr. Hill?

A. No, I didn't tell Sergeant Hill that. No.

Q. What did you tell Sergeant Hill concerning Mr. Mosley and your contact with him, or your questioning Mr. Mosley?

A. I just turned the prisoner over to Sergeant Hill.

Q. Without saying a word to him? That is, to Sergeant Hill.

A. We had conversation, but I don't recall.

Q. What was it, sir?

A. I don't recall the exact words verbatim.

(39) Q. Well, do you recall the contents, any of the remarks that you made to Mr. Hill on the occasion of turning Mr. Mosley over to Mr. Hill?

A. That I was turning him over to him for further questioning in the Leroy Williams thing.

Q. For further questioning?

A. No, for questioning. For further questioning in regards to that. I didn't talk to the kid, to Mr. Mosley about that.

Q. Of Leroy Williams?

A. Right.

Q. Is that because you hadn't arrested him for that crime?

A. Because Sergeant Hill knew the facts, and—

Q. No, answer the question.

A. Pardon?

Q. Is it because you had not arrested Mr. Mosley for that offense?

A. I wasn't in charge of that investigation, Mr. Ziemba.

Q. And that to the best of your recollection is all that you said to Sergeant Hill concerning Mr. Mosley?

A. That I can recall, yes.

Q. Was any other person present during any of your conversations with Mr. Mosley on April 8th of 1971?

A. I don't believe so, no.

• • • • •

(40) *Re-direct Examination*

(46) Q. (By Mr. Tatken): Did you know of the alleged holdup and murder of one Leroy Williams on January the 9th, 1971, prior to receiving that telephone call?

A. Yes.

Q. And how did you know of that?

A. Through the—our DB write-ups and our pattern sheets.

Q. And after getting that telephone call, did you make any check on any particular DB write-ups relating or anything relating to the alleged holdup and murder at the 101 Ranch Bar on January 9, 1971?

• • • • •

(47) The Witness: I went out to investigate him on investigation of the White Tower Restaurant and other robberies, and that's what I talked to him about.

Q. (By Mr. Tatken): No, but my question was, after getting that telephone call, did you review any police documents in relation to the alleged holdup and murder at the 101 Ranch Bar on January the 9th, 1971, involving the deceased Leroy Williams?

A. Yes.

Q. What did you review?

A. Our pattern sheets and our DB write-ups.

Q. And that's prior to going out to arrest him?

A. Yes.

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VOLUME NO. II

(Session of February 3, 1972)

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(53) JAMES COWIE, a witness called on behalf of the People, having been previously duly sworn, resumed the stand and testified further upon his oath as follows:

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(76) *Re-cross Examination*

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By Mr. Ziemba:

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Q. Drawing your attention once again to People's Proposed Exhibit No. 1, Sergeant Cowie, at the conclusion of your reading of the form which is People's Proposed Exhibit No. 1 to Mr. Richard Mosley on April 8th of 1971, at about 2:30, what then, if anything, did you say to Richard Mosley?

Did you then begin questioning him?

A. Yes.

Q. Do you recall concerning of what subjects specifically you (77) began questioning him?

A. The White Tower Restaurant.

The Court: Now when and where was this?

Mr. Ziemba: This was on April 8, 1971, at about the hour of 2:30 p.m.

The Court: Where?

Mr. Ziemba: In police headquarters.

The Court: Police headquarters?

Mr. Ziemba: Yes.

The Court: And is this before or after you allegedly advised him of his constitutional rights?

The Witness: This was after.

The Court: All right.

Mr. Ziemba: Yes, this was immediately after the witness read the form, which is People's Exhibit No. 1.

The Court: All right.

Mr. Ziemba: The Constitutional Rights.

The Court: All right. I want to get it all straight; in order.

Mr. Ziemba: Yes.

Q. (By Mr. Ziemba): Did you question Mr. Mosley about any other robbery at that time?

(78) A. No, sir.

Q. Just the White Tower Restaurant robbery?

A. Yes, sir.

Q. After you read People's Exhibit—strike that please. Now, to the best of your recollection, sir, this is the content of your statements to Mr. Mosley at the time we speak of, you read the Miranda Rights, so-called, you had Mr. Mosley sign the Miranda Rights form, which is People's Exhibit No. 1, and then you began asking questions of Mr. Mosley, is that true?

A. After he was satisfied with the Constitutional Rights form.

Q. I understand that. He signed it,—

A. Yes.

Q. —stating that he understood, is that right?

A. Yes. Yes.

Q. Was there any other conversation concerning the Miranda Rights, or that form which is People's Exhibit No. 1?

A. No, sir.

Q. You're sure of that?

A. Yes, sir, I'm sure.

Q. I think you testified yesterday that Mr. Mosley did not ask to see an attorney, is that true?

A. Yes, sir.

• • • • •

(80) Q. (By Mr. Ziemba): Since your testimony yesterday, Sergeant Cowie, and this morning, has your memory been refreshed in any manner concerning what, if anything, you said to Sergeant Hill when you placed Mr. Mosley, you might say, in the custody of Mr. Hill on April 8th of 1971?

A. No, I don't recall anything positive that I said to him. No.

Q. Do you recall mentioning anything to Mr. Hill at all that you got nothing out of Mr. Mosley, or that he refused to answer questions?

A. No, sir.

(81) Q. Nothing at all?

A. Not that I can recall.

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GILBERT HILL, a witness called on behalf of the People, after having been first duly sworn by the Court Clerk, was examined and testified upon his oath as follows:

Direct Examination

By Mr. Tatken:

Q. What is your name?

A. Gilbert Hill.

Q. Where are you employed?

A. City of Detroit, Homicide Section.

Q. How long have you been so employed there?

A. I have been in homicide for over a year and a half.

Q. Are you one of the officers in charge of the case of the People versus Richard Bert Mosley and Anthony Smith?

(82) A. I am.

Q. In such capacity did you have occasion to see one Richard Bert Mosley at the Detroit Police Headquarters Homicide Bureau on April 8, 1971?

A. Yes, I did.

• • • • •

Q. (By Mr. Tatken): What time did you first see Richard Bert Mosley on April 8, 1971, at the Detroit Police Headquarters?

A. Approximately 6:20, 6:25, something like that.

Q. And where did you see him at this time at the Detroit Police Headquarters?

A. I first saw him on the 9th floor when I went up to get him.

Q. And what did you go up to get him for?

A. To take him to the Homicide Section.

Q. For what purpose?

A. For interrogation.

Q. Interrogation concerning what particular matter, if anything?

A. The fatal shooting of Leroy Williams.

Q. And what was the date of that fatal shooting of Leroy Williams?

A. I believe it was the 1st—the 9th of January, 1971.

Q. And where did that happen?

(83) A. It happened on Goethe, approximately 150 feet west of Hillger.

Q. Is that in the City of Detroit?

A. Yes, sir, it is.

Q. Was it alleged that that was a holdup murder?

A. Yes, sir, it was.

Q. Now, prior to seeing Mr. Mosley on the 9th floor, did you have any conversation with Detective Sergeant James Cowie, or any STRESS officers, specifically John Fabian or Charles Zarkis, concerning the arrest of Mr. Mosley and subsequent interrogation?

A. Briefly.

Q. Who did you have your conversation with and at what time?

A. I believe it was Sergeant Cowie, and—can I explain how I got to this?

Q. Yes.

A. We had been in the street working on another homicide—

Q. By "we," who do you mean?

A. I mean my partner at the time, Sergeant Mason.

Q. Go ahead.

A. When we came in around 3:30 or so in the afternoon, we were told by the executive lieutenant, who at that time was Lieutenant Domm, that a man was in custody who was suspected of a fatal shooting of Leroy Williams. And we were told that we could get more details from the holdup squad.

(84) And it was near quitting time at that time, and we didn't have too much time to talk; there was most of them getting off, and I believe I spoke to Sergeant Cowie, and he told me that he had talked to Smith and Mosley and someone else regarding some holdups out on the east side, and that he was turning him over to us for investigation regarding murder.

Q. Now, did Sergeant Cowie tell you that Mr. Mosley had given a statement regarding these alleged holdups?

A. He told me that he hadn't given any statement at all, I believe he denied implications (sic) or something like this.

• • • • •

(85) Did Sergeant Cowie say anything to you about Mr. Mosley requesting an attorney during any part of that interrogation?

A. He just said they had been at—the two men had been advised of their rights, and he stated that both of them denied implication in any robberies. He said that he had advised them—

Q. Pardon?

A. He stated that he had advised them, and he told me that he had the Miranda warning form there.

Q. But outside of that, did Sergeant Cowie tell you that at any time during his interrogation of Mr. Mosley re alleged holdups, that he had wanted an attorney?

(86) A. Not that day, but the next day he did.

Q. Let me get that straight now.

The next day what?

A. Well, I assumed that you are asking me what had happened on the 8th of April.

Q. Yes, that's what I'm interested in.

A. Right.

Q. Did Sergeant Cowie prior to the time that you started questioning Mr. Mosley tell you that Mr. Mosley had requested an attorney during any part of the interrogation?

A. No, he did not. No, he did not tell me that.

The Court: You said the next day he told you, though?

The Witness: Yes, sir.

The Court: Who told you the next day?

The Witness: Sergeant Cowie. I asked him the next day specifically.

The Court: Yes?

The Witness: Because of what had happened.

The Court: And then what did Sergeant Cowie tell you?

The Witness: He said, no, he had not requested an attorney. And I asked him if he had asked to call his parents. He said he had given him an opportunity, (87) and he said, as a matter of fact, his father was there when he was arrested.

• • • • •

Q. And at what time did you bring him down to the 5th floor?

A. As I said, I went upstairs to get him about 6:20 or 6:25, something like that.

• • • • •

(88) Q. Now, when you brought him down, did you also bring down another defendant by the name of Anthony Smith?

A. Oh, when I took Smith back upstairs, this is when I brought Mosley down.

Q. Had you talked to Smith already?

A. Yes, sir, I had.

Q. Prior to talking to Smith, had you advised him of his constitutional rights?

A. Yes, sir.

Q. At what time did you talk to Smith, if you can recall?

A. I have no independent recollection of the time.

Q. But it was before you brought Mosley down?

A. Yes, sir, it was.

Q. Did Smith give you a statement in regard to the alleged holdup murder occurring on January the 9th, 1971, concerning the deceased Leroy Williams?

A. Yes, sir, he gave us an oral statement at that time.

Q. Did it implicate himself as well as the defendant Richard (89) Bert Mosley?

A. Yes, sir, it did.

The Court: Was Mr. Mosley present when he gave you the statement?

The Witness: No, sir.

• • • • •

Q. (By Mr. Tatken): Okay. Now, you brought Richard Mosley down to the homicide bureau, correct?

A. Yes, sir.

Q. And about what time would that be?

A. 6:25, 6:30; something like that.

Q. And what did you do in relation to Richard Mosley at this time at the Homicide Bureau?

A. The first thing I did was I got two Miranda warning forms out.

• • • • •

(90) Q. (By Mr. Tatken): I will show you People's Proposed Exhibit No. 2, and what is that, please?

A. This is Detroit Police Department constitutional rights certificate of notification.

Q. Is that one of the two forms you got out—

A. Yes, sir.

Q. —on that day?

(Handing exhibit to Mr. Ziemba)

Mr. Ziemba: Thank you, Mr. Tatken.

Q. (By Mr. Tatken): Now, after getting out those two forms, what did you do with the one that you have identified as People's Proposed Exhibit 2?

A. I told him to read it to himself.

Q. You told who to read what to himself?

A. Mr. Mosley. I asked him if he could read. And I told him I wanted him to read this to himself.

• • • • •

(91) Q. (By Mr. Tatken): You told him to read that form to himself?

A. Right. After I asked him if he could read.

Q. And did he reply that he could read?

A. Yes, sir.

Q. Did you ask him how far he had gone in school?

A. Yes, sir.

Q. What did he say to that?

A. He told me he went through the 10-A at Southeastern High.

Q. And did he appear to be reading that particular form?

A. Yes, sir.

Q. And that's the standard, is it not, Constitutional Rights Certificate of Notification form printed by the Detroit Police Department?

A. Yes, sir. Distributed by the Detroit Police Department, I know.

Q. Might be printed by some private printer, correct?

A. Right.

Q. All right. Now, he appeared to be reading this, correct?

A. Right.

Q. By that, his eyes scanned the particular paper?

A. Right.

Q. Did he repeat it out loud as some people do?

A. Not then. I told him to read it silently.

Q. And did he do so?

(92) A. Yes. When he said he was through, then I told him to read it out loud.

Q. And did he read it out loud?

A. Yes, sir.

• • • • •

A. I had him read it to himself. Then I had him read it out loud. Then I read it to him as I explained it to him.

Q. Did he read it back aloud the same way as you read it to him?

(93) A. No, he read it silently.

Q. Yes.

A. Then he read it out loud. I wanted him to do that so I could know that he could read.

Q. Okay.

A. And then when he did that, then I went through and explained it to him.

Q. But not only did he read it silently, he read it out aloud, and then you read it out aloud to him, is that correct?

A. I assumed he read it silently. Then he read it out aloud. And then I went through and explained it to him.

Q. All right. And was he reading it back correctly? Were you comparing it with the form?

A. Yes, sir, he was.

• • • • •

Q. (By Mr. Tatken): Then you say you explained it to him?

A. Yes, sir.

Q. Did he ask for any explanation of any of 1 through 5?

(94) A. Nothing specific. I made it plain.

Q. May I see that form?

Did he indicate to you that he understood his rights?

A. Yes, sir, he did.

Q. And did he sign that form in front of you?

A. Yes, sir, he did.

Q. At what time?

A. At 6:35 p.m. on the 8th of April, 1971.

Q. Now, at any time did he ask for an attorney?

A. No, sir, he did not.

Q. At anytime during your questioning did he ask to make a telephone call?

A. He did not ask to make a phone call. I think he stated he had already made one. He said his father was there when he was arrested.

Q. Did he ask at any time during your questioning to see any of his relatives?

A. No, sir. He said that his father was present when he was arrested.

Q. Did he ask at any time that the questioning be terminated?

A. No, sir, he did not.

Q. Now, did you take a statement from him?

A. Yes, sir, I did

Q. Prior to taking that statement from him, did you promise (95) him anything in return for that statement?

A. No, sir, I did not.

Q. Did you physically mistreat him in any way?

A. No, sir, I did not.

Q. Did you tell him at this time, prior to taking a statement from him, that Anthony Smith had already confessed to this particular crime and had implicated him?

A. I did.

Q. Did you tell him he had better confess because his accomplice had?

A. No, sir.

Q. Did you tell him that Anthony Smith, because of his confession, was going to get some sort of special treatment?

A. No, sir, I did not.

• • • • •

(96) Q. What time did you obtain a statement from the defendant Richard Mosley?

A. Some time after 6:35 p.m. on the 8th of April, 1971.

Q. How long approximately after 6:30?

A. This is one continuous action; this form was signed at 6:35, and we went right through it.

• • • • •

(100) Q. (By Mr. Tatken): Now, after he gave a statement to you, what did you do with Mr. Mosley?

A. I took him back upstairs.

Q. And did you have any conversation with him as you took him back upstairs?

A. Yes. He said—when we got around to the elevator he said a couple of things.

Q. What did he say to you at this time?

A. He said they were really sorry, and that he repeated that they were junkies, and said that he felt more better.

Q. More better about what?

A. Since he talked to me.

• • • • •

(101) *Cross Examination*

By Mr. Ziemba:

Q. When you talked to Sergeant Cowie on April 8th in the afternoon, Mr. Hill, did Sergeant Cowie tell you that the—that Mr. Mosley had signed one of these Miranda forms issued by the Detroit Police Department, one of—I think it is Exhibit 1?

A. No, he didn't.

• • • • •

(102) Q. On April 8th, before you talked to Richard Mosley,—

A. Okay.

Q. —did you learn from any source whatever that Richard Mosley had signed one of these Miranda forms supplied by the Detroit Police Department, or any other police officer?

A. No, sir.

Q. You had not?

A. No, sir.

Q. After you read—after you read to Mr. Mosley the form which has been marked People's Exhibit No. 2, and explained the individual items appearing on the form, which is People's Exhibit No. 2, what then, if anything, did you say to the—to Mr. Mosley?

A. Well, may I straighten you out, please?

Q. All right.

A. There were two forms. I gave him this form to read, and to read back to me.

Q. Yes?

A. And then I had him hold this form while I read the other form, another form to him, so that he would be looking at this while I was explaining this to him. So this is

not the form that I read, although it says the same thing, (103) and was printed at the same time.

Q. All right, I stand corrected.

A. Do you understand?

Q. Yes. You had in effect another blank identical form?

A. Right.

Q. And you had Mr. Mosley hold in his hand what has been marked People's Exhibit No. 2?

A. This one, yes, sir.

Q. And you were reading identical language from this other blank form which has not been marked an exhibit?

A. No, sir.

Q. You were reading that aloud to him, and Mr. Mosley presumably was reading the Exhibit No. 2 which he held in his hand?

A. Yes, sir.

Q. And after you finished your reading you explained some things to him, did you not?

A. Yes, sir.

Q. Wasn't that your testimony?

A. Yes, sir.

• • • • •

Q. Would it be fair to say then that you then proceeded to the questioning of Mr. Mosley concerning the robbery and killing (104) of Leroy Williams?

A. Yes, sir.

Q. Do you recall what the very first thing you said to Mr. Mosley was?

A. I don't recall the exact words, no, sir.

Q. But you do recall in—what the thought was that you were conveying to—

A. Yes. That he was accused of the—accused of being the shooter in the holdup shooting of Mr. Leroy Williams, and I asked him if he wanted to tell me about it.

Q. Did you tell him—did you tell Mr. Mosley who the accuser was?

A. Not at that time.

Q. When did you first mention Anthony Smith's name to Mr. Mosley?

A. When Mr. Mosley denied being involved at all.

Q. And when did Mr. Mosley deny being involved at all?

A. Almost right away.

Q. Would it be fair to say it was immediately after you informed Mr. Mosley that he had been accused of being the shooter in the Williams murder?

A. Almost immediately.

Q. And to his denial you rejoined with the information that Anthony Smith had confessed, is that true?

A. Yes, sir.

(105) Q. And that Anthony Smith in his confession implicated—

A. Yes, sir.

• • • • •

Q. What else did you say to Mr. Mosley on the subject?

A. And that Anthony Smith had admitted that they had planned the holdup inside the bar, and that Anthony Smith and Charles Little were to grab the man and hold him, and he was to put the gun on him, and that he had panicked and shot the man.

Q. Did you tell Mr. Mosley anything else at this time on that subject?

A. I don't recall, but I might have.

Q. Do you recall whether Mr. Mosley made any comment or reply to these statements or this information?

A. No. I seem to remember what is the use look on his face.

Q. What's the use look on his face?

A. Yeah; like that.

Q. What then did you say, if anything?

A. I didn't say anything. Then he decided to tell me about it. (106) Then he said that he didn't—he was not trying to kill the man, and that—

Q. All right. Now,—now before—before that point is reached, allow me to interrupt you, Mr. Hill.

Is it your testimony that you never mentioned to Mr. Mosley the potential difficulty that he was in in view of the statement—the confession of Anthony Smith?

A. I don't know exactly how you mean that.

Q. Did you say to Mr. Mosley, now, look, we have a confession from Anthony Smith, and he put you right in the picture, or something of that nature, and you've got Murder One looking at you, or anything of that nature?

A. I told him—

Q. It looks bad for you?

A. —I told him they were charged with Murder, and I told him that all we had at that time was Anthony Smith's statement, and Anthony Smith said that he was the man with the gun.

And I also told him that as far as we know for sure, since we were not there, Anthony Smith might have been the man with the gun.

The Court: You say Anthony Smith might have been the man with the gun?

The Witness: Yes, sir.

(107) Q. (By Mr. Ziemba): Did you tell him anything about the difficulty that he was in, the seriousness of the offense?

A. I told him he was under arrest for Murder, being interrogated, First Degree Murder, holdup murder.

Q. Did you tell him what the penalty was?

A. No, I didn't.

Q. Did you tell Mr. Mosley he could go to jail for life?

A. No, I didn't.

Q. Did you mention anything at all to Mr. Mosley about the advisability of his being open and honest and forthright with you, Mr. Hill?

A. Did I—you mean, did I tell him he would be better off if he confessed, or something like this?

Q. Did you make any mention at all?

A. No, not in that manner.

Q. In what manner?

A. I didn't make any mention in that manner. I didn't make any statement to (sic) that sort.

Q. You did not?

A. No, sir, I did not. We talked the next day.

Q. So that it's your testimony you gave the Miranda warning, so-called—

A. Yes, sir.

Q. —to Mr. Mosley?

A. Yes, sir.

(108) Q. Then you told Mr. Mosley that Anthony Smith had confessed and said that Mr. Mosley was the trigger man?

A. Right.

Q. Right?

A. I told him exactly what Anthony Smith had told me.

Q. And then Mr. Mosley proceeded to tell you the contents of the statement which is proposed Exhibit 3 for the People, is that right?

A. Yes, sir.

Q. And you had no other conversation, you addressed no other remarks to Mr. Mosley at this time?

A. There might have been something said, but there was nothing along the vein that you are suggesting.

Q. Well, tell us what you said.

A. I said there might have been—I don't remember that far back, sir, this was almost a year ago.

* * * * *

(109) Q. I understand. Isn't it true, Mr. Hill, that when you were interrogating Anthony Smith, that you told Anthony Smith that Richard Mosley had confessed?

* * * * *

(115) Q. (By Mr. Ziemba): Give us please, Mr. Hill, the date and the time when you received a confession from Anthony Smith.

A. I talked to Anthony Smith some time after 4 p.m. on the 8th.

Q. But specifically answer the question, sir. Give us the date and the time that you received a confession from Anthony Smith.

A. I'm trying to be specific, counsellor.

Q. Yes.

A. I talked to Anthony Smith some time between 4 p.m. and some time after 4 p.m. and before 6:35 p.m. on the 8th of April. And we talked to him again and took a statement the next morning.

Q. It's your testimony, then, sir, that you took a formal written so-called statement from Anthony Smith on April 9th?

A. Yes, sir.

Q. But you took an oral admission and confession from Anthony Smith some time before 4 p.m. and 6:35 p.m.?

A. Right.

* * * * *

(117) Q. Can you explain to the Court, sir, why your method of operation was different in the taking of a confession from Anthony Smith from your taking the confession from Richard Mosley?

A. I don't see where it is different.

Q. Well, it is different in this respect, I suggest, Mr. Hill, that on April 8th, between the hours of 4 p.m. and 6:30 p.m. you took an oral statement from Anthony Smith, but you did not reduce that confession to writing until the (118) morning of April 9th.

Whereas you testified that you took an oral statement from Richard Mosley at about 6:30 p.m. and reduced it to writing at 6:35 p.m. on April 8, 1971.

A. Yes, sir.

Q. What is your explanation, sir?

A. Well, the difference there is when we talked to Richard Mosley—I mean to Anthony Smith, he stated that he was in the bar, that he was present there, he saw the gun, but he was placing all the blame on Richard Mosley. And this is why we did not reduce this to writing at that time. I wanted to hear—I wanted to inform Mr. Mosley what Anthony Smith had said.

Q. Yes. Now isn't it a fact, Mr. Hill, that after talking to Richard Mosley you went back to Anthony Smith and told Anthony Smith that Richard Mosley had confessed?

A. The next morning.

Q. Isn't that a fact?

A. The next morning we talked to—

Q. That is a fact?

A. The next morning, yes, sir.

• • • • •

(120) Q. (By Mr. Ziemba): Mr. Hill, when you were questioning Anthony Smith on April 8th, between 4 p.m.

and 6:30 p.m., (121) did you tell Anthony Smith or suggest to him in any manner that Richard Mosley had confessed in the matter of the killing of Leroy Williams?

A. No, sir, I did not.

• • • • •

(124) A. Since he had helped us. This was after I took the statement from him.

Q. And you were referring to what, Mr. Hill, in terms of Anthony Smith having helped you?

A. He told us what happened on the—on the 8th when I spoken (sic) to him. He told us what happened. And then Richard Mosley confessed. And the next morning I took a statement from Anthony Smith, and after the statement he asked some questions about what was going to happen to him.

Q. But it is your testimony that you never suggested any special treatment or leniency to Anthony Smith when you questioned him on the 8th, between 4 and 6 p.m.?

A. That is correct. It's right in his statement. It's right in Anthony Smith's statement.

Q. I understand. Did Anthony Smith at any point during your contact with him concerning the Leroy Williams killing deny his guilt in that homicide?

A. He denied pulling the trigger, or planning the robbery, but he did not deny being there and witnessing the robbery.

Q. Is it your testimony, Mr. Hill, that Anthony Smith never denied to you that he had robbed Leroy Williams, or that he was involved in it in any manner?

A. He denied that he had robbed the man or touched the man, but he did not deny being there and seeing the man grabbed, or hearing the shot. He did not deny this. But he denied (125) a physical participation in the robbery itself.

He said he did not go through his pockets, he did not grab the man, he did not shoot him.

The Court: How did he involve himself then?

The Witness: He said that when they were in the bar that Richard had a gun, and Charles Little had seen a man at the bar with some money with a bank roll, and Charles Little asked Richard for his gun. And Richard told him he wasn't giving anybody his gun.

And then Richard or Charles, I can't remember now which, told him to go up to the bar and check the man out for money, see how much he had. And he said he went up to the bar and saw a roll, and he came back and told them.

Then they continued to play pool off and on.

The Court: So all Anthony Smith did was went up to the bar and checked the man out?

The Witness: Right. And he said he agreed with Anthony Smith, and he agreed with Richard Mosley and Charles Little, that Little and he would grab the man while Richard held the gun on him. He said he agreed, but he said he refused to do this after he got outside.

(126) Q. (By Mr. Ziemba): Now, you are speaking of Anthony Smith's statement on the 8th or on the 9th?

A. This is on the 8th.

Q. Is it your testimony, Mr. Hill, that the oral statement which you received from Anthony Smith on April 8th, between 4 p.m. and 6:30 p.m.—

A. Right.

Q. —was in material respects identical with the statement that you took from Anthony Smith on the morning of April 9th?

A. I would say it was quite similar, yes. Quite similar.

Q. Let me ask you this. Quite frankly, Mr. Hill, did Anthony Smith dig the hole deeper for himself by his statement on April 9th that he had dug in the hole by his statement on April 8th?

Did he further implicate himself by that statement?

A. I would say yes.

Q. In what respect, sir?

A. Well, I specifically asked him why he was telling us this now. If I can remember correctly.

Q. You're speaking now of what, sir, on the 9th?

A. On the 9th. And he said that because you told me to tell you the truth.

And then my next question was, even (127) though you might spend a considerable portion of your life in prison?

And he said yes.

And I would say that's digging the hole deeper.

Q. Did you ask Anthony Smith to tell you the truth on April 8th?

A. Yes, sir.

Q. Would you say, Mr. Hill, that your, you might say, modus operandi in eliciting confessions from suspects is to immediately reduce what you regard to be a confession to writing immediately after the suspect has spoken the confession?

• • • • •

(129) Q. (By Mr. Ziemba): When you were finished talking to Anthony Smith on April 8th, between 4 and 6:30 p.m., did you feel that you had a confession of guilt from Anthony Smith?

• • • • •

The Witness: What I thought I had at that time was at least a witness to the murder of Leroy Williams.

Q. (By Mr. Ziemba): So that your answer is that you did not think that you had a confession of guilt from Anthony Smith?

A. I think we had—I knew we had an accomplice, and I knew we had a witness.

Q. Can you answer the question, Mr. Hill?

A. You asked me if we thought we had a confession of guilt?

Q. You did?

A. No, that's not what I though at that time. I'm trying to (130) tell you what I thought at that time.

Q. Then your answer is no?

A. My answer is no.

Q. But I think your testimony was that when you—later that evening, at 6:35 or thereabouts on April 8th, when you spoke to Richard Mosley, you told Richard Mosley that Anthony Smith had confessed and implicated Richard Mosley?

A. I did.

The Court: Was there any particular reason why you would tell him that if you didn't think the man had confessed?

The Witness: Yes, sir.

The Court: What reason?

The Witness: I have done it a lot of times when there has been no confession.

The Court: Yes, but why do you do that? Are you trying to get him to confess by telling him that?

The Witness: I wasn't trying to get him to confess in this instance, but I have done that.

The Court: With that expectation?

The Witness: Yes, sir.

The Court: In other words, you are going to trick him into it?

The Witness: Well, I would tell them (131) their partners have confessed.

The Court: I mean, you are going to trick him into it?

The Witness: To see if he would deny it. No, sir, I don't always tell a prisoner the truth.

The Court: You don't think you should?

The Witness: I would tell him sometimes we have their fingerprints, and we don't have it, or something along this nature.

The Court: All right.

• • • • •

(148) RICHARD BERT MOSLEY, the defendant herein, called as a witness in his own behalf, having been first duly sworn by the Court Clerk, was examined and testified upon his oath as follows:

Direct Examination

By Mr. Ziemba:

Q. Will you state your name, please?

A. Richard Mosley.

Q. What is your age, Mr. Mosley?

A. 19.

Q. You were arrested on April 8th of 1971, were you, sir?

A. Yes, sir.

Q. What was your age on the date of your arrest?

A. 18.

• • • • •

(149) Q. (By Mr. Ziemba): Did you talk to Sergeant Hill at any time on April 8th of 1971?

A. Yes, sir, I did.

Q. Did you talk to Sergeant Hill once or more than once on April 8th of 1971?

A. Just once.

Q. Do you recall at what time of the day it was that you spoke to Sergeant Hill?

A. It was about 5:35, because I remember looking at the clock.

Q. Do you remember where it was that you spoke to Sergeant Hill?

A. It was in some little room that he took me to.

Q. Do you know on which floor it was of the police headquarters?

A. No, I'm not sure.

Q. When—strike that, please.

Where did you first see Sergeant Hill on April 8th of 1971?

A. When he came to get me. He carried me downstairs.

Q. And where were you when he came to get you, sir?

A. I was locked up on the 9th floor.

(150) Q. Do you—I hand you, witness, People's Proposed Exhibit No. 2, and ask you, sir, whether you have ever seen that proposed exhibit before?

A. Yes, I did.

Q. And where did you see it for the first time?

A. On April the 8th, 1971.

Q. And was that at the time that Sergeant Hill spoke to you?

A. Yes. This is—yes, it was.

Q. Does your signature appear on that proposed exhibit?

A. Yes, sir.

Q. Did you sign it, sir, in Mr.—in Sergeant Hill's presence?

A. Yes, I did.

Q. Was that after you read this particular exhibit?

A. Yes, it was.

Q. And was it after Sergeant Hill explained the five points which appear on the exhibit?

A. Yes. Yes.

Q. Do you recall what Sergeant Hill said to you directly after he—after you signed this particular form which is (151) Proposed Exhibit No. 2?

A. Yes, I do.

Q. What did he say?

A. He told me Anthony Smith already made a statement, and that to go ahead, and if I go ahead and tell what I know, that I might get off light. That he would talk to the Judge to try to get it knocked down to Manslaughter.

Q. Did Sergeant Hill tell you what you were suspected of, or being investigated for?

A. Yes, he did.

Q. What did he say to you?

A. For Murder that was committed on Goethe and Hillger.

Q. Did he tell you what degree of murder you were charged with?

A. Yes, he did.

Q. What degree did he tell you?

A. First Degree.

Q. Did Sergeant Hill tell you anything about the penalty which attached to Murder in the First Degree if you were convicted?

A. Yes.

Q. What did he tell you?

A. He told me it carried life.

Q. Did Sergeant Hill tell you anything concerning the penalty which attached to the crime of Manslaughter if you were convicted of that?

(152) A. Yes, he did.

Q. What did he tell you?

A. He told me it carried up to a maximum of fifteen years, and that I can get probation.

Q. That you can get probation?

A. Yes.

Q. Did Sergeant Hill tell you, at the time we speak of, Mr. Mosley, anything about what Anthony Smith had told Sergeant Hill?

A. No. All I know is he just told me Anthony Smith had said I did—did—did—put everything on me, you know. That's all I can remember is that he told Anthony Smith that—he told me that Anthony Smith had put everything on me.

• • • • •

Q. How did you feel is the question, Mr. Mosley?

A. I was confused after he told me Anthony Smith had made a statement and put it all on me.

• • • • •

(153) Q. (By Mr. Ziemba): Were you afraid at all; were you frightened at all when Sergeant Hill was questioning you?

A. Yes, I was.

Q. Did you become frightened when Sergeant Hill had said Anthony Smith had put everything on you?

A. Yes, I was. And after he had told me that I were facing life, and that if I don't go ahead and tell what I know, that I would get life.

(154) Q. And that scared you,—

A. Yes.

Q. —is that right?

A. Yes, it did.

Q. And was that the reason that you made a statement to Sergeant Hill?

A. Yes, it was.

Mr. Ziemba: I have no further questions, your Honor.

• • • • •

VOLUME NO. IV

(Session of February 7, 1972)

ORDER DENYING MOTION TO SUPPRESS CONFESSION

(5) The Court: All right, then the motion—I want the record to show that the Court has also done some research in this matter, and that I have researched this matter from the case of—I think it was Brown versus Mississippi, when the United States Supreme Court first applied the Fourteenth Amendment to state trials as to confessions.

And then we followed the cases from Chambers versus Florida, McNabb versus Tennessee, and Culombe versus Connecticut, which Justice Frankfurter wrote an extensive opinion.

And then we came to Haley versus Ohio, which dealt with a young man. And in the case of People versus Roberts, in the State of Michigan, and the People versus Hamilton.

And taking into the totality, the total circumstances surrounding this case, the People of the State of Michigan versus Richard Bert Mosley, the Court feels that the confession should not be suppressed, and, therefore, the motion is denied.

• • • • •

OPINION OF THE MICHIGAN COURT OF APPEALS

(See pp 11-13 of Petition for Writ of Certiorari)

(Title omitted)

ORDER OF THE MICHIGAN COURT OF APPEALS

(See p 14 of Petition for Writ of Certiorari)

(Title omitted)

ORDER OF THE MICHIGAN SUPREME COURT DENYING APPLICATION FOR LEAVE TO APPEAL

(See pp 15-16 of Petition for Writ of Certiorari)

(Title omitted)

ORDER OF THE MICHIGAN SUPREME COURT DENYING APPLICATION FOR RECONSIDERATION OF DENIAL OF LEAVE TO APPEAL

(See pp 16-17 of Petition for Writ of Certiorari)

(Title omitted)

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-653

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,
vs
RICHARD BERT MOSLEY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

MEMORANDUM FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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MEMORANDUM FOR RESPONDENT IN OPPOSITION

Respondent was charged with the commission of the offense of murder in the first degree. It was charged that he killed his victim in an armed robbery or in an attempt to perpetrate an armed robbery, a felony murder.

Respondent was arrested without warrant three months after the alleged crime was committed. The arresting officer testified that he received an anonymous telephone call that several persons, including the defendant, were holding up places on the lower east side of Detroit and the caller

mentioned the name of the deceased victim in this case.

The arresting officer did not take respondent before a magistrate after arresting him at 1:00 p.m. because, he testified, he felt that he needed more information before he could apply for a warrant and because he hadn't completed his investigation.

Upon his return to police headquarters with respondent, the arresting officer questioned respondent about several robberies, not including the robbery in question in this case. During this questioning period and after he had been advised of his *Miranda* rights and signed a form acknowledging that he had been told of his *Miranda* rights, respondent declined to answer *any questions about robberies.*

After the arresting officer had completed his questioning of respondent, the officer turned respondent over to another officer of the Detroit Police Department who was assigned to the homicide section. It is unclear from the transcripts whether the arresting officer had told the second officer that respondent had declined to answer any questions about robberies.

The second homicide officer gave respondent his *Miranda* rights and respondent signed a form acknowledging that such were given to him. The officer then told respondent that his purported accomplice had confessed and implicated respondent, putting respondent on the trigger, and that respondent faced a life term. Respondent then gave a purported confession.

The Michigan Court of Appeals held that under *Miranda vArizona,* 384 US 436, 86 S Ct 1602 (1966), it is clear that once warnings have been given to a suspect, if he in any manner, at any time prior to or during questioning, indicates that he wishes to remain silent, the questioning must cease. The Michigan Court of Appeals also held that this

clear procedure prescribed by this Court in *Miranda* cannot be circumvented by the simple expedient of shuttling a person from one police officer to another for purposes of questioning and thus justifying subsequent interrogations after an election to remain silent.

The Michigan Court of Appeals was correct.

In *United States v Crisp,* 435 F2d 354, 357, (CA 7, 1970), the Court said:

> "To be effective, those safeguards [*Miranda* rights] must be fully observed, and the rights of the suspect must be jealously guarded. Not even the slightest circumvention or avoidance may be tolerated."

The Michigan Court relied upon this Court's holding in *Westover v United States,* 384 US 494, 496, 86 S Ct 1638, 1639 (1966), where this Court recognized a situation where a suspect could be questioned by a police officer after he had indicated once that he wished to remain silent. That was a situation where the accused was taken into custody by the police of a second authority and the suspect was physically removed in both time and place from the surroundings of his original interrogation and then advised of his rights a second time and given an opportunity to exercise them.

Patently, the case at bar does not fall within the example of *Westover.*

Petitioner states in his petition (p8) that when the second police officer advised respondent of his rights the second time, respondent "signed a waiver of his rights". However, petitioner states in his petition (p4) that when questioned by the first police officer, the arresting police officer, respondent signed a Constitutional Rights Certificate of Notification "acknowledging the giv-

ing of those rights," and on page 5 of his petition, petitioner states that respondent "read his rights prior to signing the notification form" which the second police officer used to explain to respondent the latter's Miranda Rights.

Hence, it is inaccurate for petitioner to state at page 8 that respondent signed a waiver of his rights.

> "Once a defendant has asserted his privilege to remain silent, a governmental claim of waiver must be scrutinized with special care." *McIntyre v New York,* 329 F. Supp 9, 13 (USDC Ed NC, 1971).

However, the real thrust of petitioner's complaint is that the Michigan Court has misread *Westover* and has established *Miranda* standards for Michigan courts which are higher than those established by this Court in *Miranda.*

The ready answer to this complaint is that the Michigan Courts are free to develop their own rules in certain areas of law providing only that they do not violate the constitutional proscriptions established by this Court.

In short, the Michigan Courts are not at liberty to establish lower standards than those established by this Court in a certain area of law, but the Michigan Courts are at liberty to establish higher standards. *Ker v California,* 374 US 23, 83 S Ct 1623 (1963).

Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER TERM, 1974

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Respondent.

BRIEF FOR THE STATE OF MICHIGAN

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-653

THE STATE OF MICHIGAN,
Petitioner,
v.
RICHARD BERT MOSLEY,
Respondent.

BRIEF FOR THE STATE OF MICHIGAN

OPINION BELOW

The opinion of the Michigan Court of Appeals, Division I, (Petition for Writ of Certiorari, Appendix A, pp 11-13), is reported at 51 Mich App 105; 214 NW 2d 564 (1974).

JURISDICTION

The Judgment of the Michigan Court of Appeals was entered January 14, 1974 (Petition for Writ of Certiorari, Appendix A, p 11). Application for Rehearing was denied on March 11, 1974 (Petition for Writ of Certiorari, Appendix B, p 14). Application for Leave to Appeal to the Michigan Supreme Court was denied on June 27, 1974 (Petition for Writ of Certiorari, Appendix C, p 15). Application for Reconsideration was denied by the Michigan Supreme Court on August 28, 1974 (Petition for Writ of Certiorari, Appendix D, pp 16-17), the date Petitioner exhausted his state remedies. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

QUESTIONS PRESENTED

I.

Whether an accused who has once invoked his right to remain silent, may subsequently waive his Miranda rights prior to a later interrogation which is conducted for good faith reasons in a non-coercive manner and is not initiated for the purpose of undermining the right previously exercised.

II.

Whether the invocation of the right to remain silent relative to one crime precludes interrogation vis-a-vis a separate crime.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision which the present case involves is the Fifth Amendment to the United States Constitution which provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense or be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT

Respondent, Richard Bert Mosley, was convicted by jury verdict on April 5, 1972 in Detroit's Recorder's Court for the First Degree Murder of one Leroy Williams (A.3).[1] A confession made by Respondent was used against him at trial (R. 487-490).[2] The admissibility of said confession is the question presented to this Court in the instant case (Petition for Writ of Certiorari, p. 3).

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[1] References prefaced by A. refer to the pages in the joint appendix.

[2] References prefaced by R. refer to the record pages of the trial transcript.

Defendant Mosley was arrested at 1:05 P.M. on April 8, 1971 in connection with certain robberies that had occurred on Detroit's lower east side (A. 4-5, 17; R. 448).

Detective James Cowie of the Armed Robbery Section of the Detroit Police Department effected the arrest of Respondent for the armed robbery of the White Tower Restaurant and the Blue Goose Bar (A.12).[3] Cowie conveyed Respondent to the Robbery, Breaking and Entering Bureau located on the 4th floor of police headquarters (A. 6-7).

There, Cowie informed defendant Mosley of his *Miranda* rights. Respondent signed a Constitutional Rights Certificate of Notification acknowledging the giving of those rights and stated that he completely understood his rights (A. 7-8, 19-20; R. 455, 569-571). Cowie then asked Respondent about the White Tower robbery (A. 18-19).

Detective Cowie talked with defendant Mosley for only twenty minutes and the questioning ceased when Respondent declined to talk about the White Tower robbery (A. 13-14; R. 455, 558-559, 572).[4] At no time did Respondent request an atorney pursuant to the rights contained in the *Miranda* warnings (A. 9, 20). Cowie then took defendant Mosley from the 4th floor Armed Robbery Bureau to the 9th floor cell block area, the time of said transfer being

[3] Cowie stated that he received an anonymous telephone tip during the first week in April, 1971 in which he was told that Respondent and three other men—Anthony Smith, Ernest Thompson and Richard Christian—were involved in a series of robberies on the lower east side of Detroit (A. 4-5, 12).

[4] Detective Cowie testified that the twenty minutes he spent with Respondent included the time spent processing the necessary arrest papers (A. 14).

approximately 4:00 p.m.; and except for informing Respondent that Detective Gilbert Hill of the Homicide Bureau would speak with him, Cowie had no further contact with Respondent (A. 10-11, 15).

Thereafter, at about 6:20 p.m. Defendant Mosley was taken from the 9th floor cell block area to the 5th floor Homicide Bureau by Homicide Detective Gilbert Hill. Hill saw Respondent to interrogate him regarding the robbery-murder of Leroy Williams which had occurred some three months earlier (A. 21-22, 24; R. 459, 477-481). Prior to questioning, Hill again informed Defendant Mosley of his *Miranda* rights and the purpose of the interrogation. Respondent Mosley again indicated that he understood his rights and executed a signed *Miranda* rights form. At no time did he request counsel (A. 25-28, 42-43; R. 560-561).[5]

[5] On direct examination Detective Hill testified as follows concerning his contact with Respondent:

* * * * *

Q. (By Mr. Tatken): Okay. Now, you brought Richard Mosley down to the homicide bureau, correct?

A. Yes, sir.

Q. And about what time would that be?

A. 6:25, 6:30; something like that.

Q. And what did you do in relation to Richard Mosley at this time at the Homicide Bureau?

A. The first thing I did was I got two Miranda warning forms out.

* * * * *

(90) Q. (By Mr. Tatken): I will show you People's Proposed Exhibit No. 2, and what is that, please?

A. This is Detroit Police Department constitutional rights certificate of notification.

Q. Is that one of the two forms you got out—

A. Yes, sir.

Q. —on that day?

(Handing exhibit to Mr. Ziemba.)

Mr. Ziemba: Thank you, Mr. Tatken.

Q. (By Mr. Tatken): Now, after getting out those two forms, what did you do with the one that you have identified as People's Proposed Exhibit 2?

A. I told him to read it to himself.

(*continued on next page*)

Detective Hill then proceeded to question Respondent relative to the murder of Leroy Williams (A. 32).

(continued from preceding page)

Q. You told who to read what to himself?

A. Mr. Mosley. I asked him if he could read. And I told him I wanted him to read this to himself.

* * * * *

(91) Q. (By Mr. Tatken): You told him to read that form to himself?

A. Right. After I asked him if he could read.

Q. And did he reply that he could read?

A. Yes, sir.

Q. Did you ask him how far he had gone in school?

A. Yes, sir.

Q. What did he say to that?

A. He told me he went through the 10-A at Southeastern High.

Q. And did he appear to be reading that particular form?

A. Yes, sir.

Q. And that's the standard, is it not, Constitutional Rights Certificate of Notification form printed by the Detroit Police Department?

A. Yes, sir. Distributed by the Detroit Police Department, I know.

Q. Might be printed by some private printer, correct?

A. Right.

Q. All right. Now, he appeared to be reading this, correct?

A. Right.

Q. By that, his eyes scanned the particular paper?

A. Right.

Q. Did he repeat it out loud as some people do?

A. Not then. I told him to read it silently.

Q. And did he do so?

(92) A. Yes. When he said he was through, then I told him to read it out loud.

Q. And did he read it out loud?

A. Yes, sir.

* * * * *

A. I had him read it to himself. Then I had him read it out loud. Then I read it to him as I explained it to him.

Q. Did he read it back aloud the same way as you read it to him?

(93) A. No, he read it silently.

Q. Yes.

A. Then he read it out loud. I wanted him to do that so I could know that he could read.

(continued on next page)

Defendant Mosley denied, "almost immediately," any involvement in the murder (A. 32). Hill then informed Re-

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(continued from preceding page)

Q. Okay.

A. And then when he did that, then I went through and explained it to him.

Q. But not only did he read it silently, he read it out aloud, and then you read it out aloud to him, is that correct?

A. I assumed he read it silently. Then he read it out aloud. And then I went through and explained it to him.

Q. All right. And was he reading it back correctly? Were you comparing it with the form?

A. Yes, sir, he was.

* * * * *

Q. (By Mr. Tatken): Then you say you explained it to him?

A. Yes, sir.

Q. Did he ask for any explanation of any of 1 through 5?

(94) A. Nothing specific. I made it plain.

Q. May I see that form?

Did he indicate to you that he understood his rights?

A. Yes, sir, he did.

Q. And did he sign that form in front of you?

A. Yes, sir, he did.

Q. At what time?

A. At 6:35 p.m. on the 8th of April, 1971.

Q. Now, at any time did he ask for an attorney?

A. No, sir, he did not.

Q. At anytime during your questioning did he ask to make a telephone call?

A. He did not ask to make a phone call. I think he stated he had already made one. He said his father was there when he was arrested.

Q. Did he ask at any time during your questioning to see any of his relatives?

A. No, sir. He said that his father was present when he was arrested.

Q. Did he ask at any time that the questioning be terminated?

A. No, sir, he did not.

Q. Now, did you take a statement from him?

A. Yes, sir, I did.

Q. Prior to taking that statement from him, did you promise (95) him anything in return for that statement?

A. No, sir, I did not.

(continued on next page)

spondent that Anthony Smith had made a statement naming Defendant Mosley as the "shooter" in the slaying (A. 28-29, 31-32, 34) whereupon Respondent heaved a sigh and stated that he would tell Hill about the killing. He then made a statement, which he signed, admitting his role in the murder as well as the circumstances prior and subsequent to the shooting (A. 33-34; R. 487-490).

(*continued from preceding page*)

Q. Did you physically mistreat him in any way?
A. No, sir, I did not.
Q. Did you tell him at this time, prior to taking a statement from him, that Anthony Smith had already confessed to this particular crime and had implicated him?
A. I did.
Q. Did you tell him he had better confess because his accomplice had?
A. No, sir.
Q. Did you tell him that Anthony Smith, because of his confession, was going to get some sort of special treatment?
A. No, sir, I did not.

* * * * *

(96) Q. What time did you obtain a statement from the defendant Richard Mosley?
A. Some time after 6:35 p.m. on the 8th of April, 1971.
Q. How long approximately after 6:30?
A. This is one continuous action; this form was signed at 6:35, and we went right through it.

* * * * *

(100) Q. (By Mr. Tatken): Now, after he gave a statement to you, what did you do with Mr. Mosley?
A. I took him back upstairs.
Q. And did you have any conversation with him as you took him back upstairs?
A. Yes. He said—when we got around to the elevator he said a couple of things.
Q. What did he say to you at this time?
A. He said they were really sorry, and that he repeated that they were junkies, and said that he felt more better.
Q. More better about what?
A. Since he talked to me (A. 25-29).

Defendant Mosley testified that he was in fact apprised of his *Miranda* rights by Sergeant Cowie prior to being questioned about the robberies for which he was arrested. Respondent also stated that upon being asked about the robberies he elected to exercise his right to remain silent at which time the interrogation by Cowie was forthwith terminated (R. 558-559, 569-571).[6]

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[6] Respondent testified in the following manner at trial concerning his questioning by Cowie, indicating the circumstances and procedure surrounding his interrogation:

Q. After you were arrested were you taken some place by the police?
A. Yes, I was.
Q. And where were you taken, do you remember?
A. To the police bureau, 1300 Beaubien, police station.
Q. You mean by that police headquarters?
A. Yeah, police headquarters.
Q. Did you talk to anybody when you got to police headquarters?
A. I talked to Sergeant Cowie a half hour, I think, after.
Q. Did Sergeant Cowie tell you anything about your constitutional rights?
A. Yes, he did.
Q. Did he ask you to sign some sort of paper?
A. Yes, he did. He told me to read it—read the form and sign it.
Q. Did you read the form?
A. And—yes, I did; I read it.
Q. Was that a form setting forth your constitutional rights?
A. Yes, it was.
Q. Did you sign it?
A. Yes, I did.
Q. Did you understand what you were signing?
A. Not fully. I just know it couldn't harm me in no way. I just signed it, you know, I figured that was the regular form they had.
Q. Did Sergeant Cowie tell you at that time that you didn't have to answer his questions?
A. Yes, he did.
Q. Did he say that you had a constitutional right to remain silent?
A. Yes, he did.

(*continued on next page*)

Defendant Mosley also acknowledged that Detective Hill had informed him that Hill's interrogation concerned the Leroy Williams murder; Respondent also admitted that Hill had in fact apprised him of his *Miranda* rights prior to questioning (A. 42-43; R. 560-561).[7] Respondent also stated that the reason he confessed was due to the fact that

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(*continued from preceding page*)

Q. Did Sergeant Cowie ask you whether you wanted to answer some questions?

A. He asked me did I want to talk about some robberies.

Q. And what did you say to Sergeant Cowie?

A. I told him that I didn't want to talk about anything; that I wanted to exercise my rights, and that he had arrested me illegally and didn't have a warrant for my arrest, and I wanted to go home.

Q. After you told this to Sergeant Cowie, did he ask you any further questions about any robberies?

A. No, he didn't ask me nothing else (R. 558-559).

[7] The following colloquy between defense counsel and Respondent is illustrative of the point:

Q. (By defense counsel): Where did you first see Sergeant Hill on April 8th of 1971?

A. When he came to get me. He carried me downstairs.

Q. And where were you when he came to get you, sir?

A. I was locked up on the 9th floor.

(150) Q. Do you—I hand you, witness, People's Proposed Exhibit No. 2, and ask you, sir, whether you have ever seen that proposed exhibit before?

A. Yes, I did.

Q. And where did you see it for the first time?

A. On April the 8th, 1971.

Q. And was that at the time that Sergeant Hill spoke to you?

A. Yes. This is—yes, it was.

Q. Does your signature appear on that proposed exhibit?

A. Yes, sir.

Q. Did you sign it, sir, in Mr.—in Sergeant Hill's presence?

A. Yes, I did.

Q. Was that after you read this particular exhibit?

A. Yes, it was.

Q. And was it after Sergeant Hill explained the five points which appear on the exhibit?

A. Yes, sir (A. 42-43).

Detective Hill told him that co-felon Anthony Smith had put all the blame on him and not because he was coerced or because he did not understand his rights or because he had been denied an attorney (A. 42-44; R. 580).[8] In fact, Respondent specifically testified at trial that he was not physi-

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[8] Defendant Mosley's pretrial testimony illustrates the point:

Q. Did Sergeant Hill tell you, at the time we speak of, Mr. Mosley, anything about what Anthony Smith had told Sergeant Hill?

A. No. All I know is he just told me Anthony Smith had said I did—did—did—put everything on me, you know. That's all I can remember is that he told Anthony Smith that—he told me that Anthony Smith had put everything on me.

* * * * *

Q. How did you feel is the question, Mr. Mosley?

A. I was confused after he told me Anthony Smith had made a statement and put it all on me.

* * * * *

(153) Q. (By Mr. Ziemba): Were you afraid at all; were you frightened at all when Sergeant Hill was questioning you?

A. Yes, I was.

Q. Did you become frightened when Sergeant Hill had said Anthony Smith had put everything on you?

A. Yes, I was. And after he had told me that I were facing life, and that if I don't go ahead and tell what I know, that I would get life.

(154) Q. And that scared you,—

A. Yes.

Q. —is that right?

A. Yes, it did.

Q. And was that the reason that you made a statement to Sergeant Hill?

A. Yes, it was (A. 44).

cally abused or threatened into making a statement (R. 580).[9]

The trial judge ruled that Defendant Mosley's confession was voluntarily tendered and thus admissible in evidence (A. 45) and said confession was used against Respondent at trial (R. 482, 487-490).

Respondent's conviction was reversed by a three-judge panel of the Michigan Court of Appeals, Division 1, under date of January 14, 1974. The Michigan Appellate Court found that defendant Mosley was in fact twice apprised of his *Miranda* rights by Detectives Cowie and Hill. However, the Michigan court held that, based on the dictates of *Miranda* v *Arizona,* 384 US 436 at 473-474; 86 S Ct 1602 at 1627-1628; 16 L Ed 2d 694 at 723 (1966), all interrogation of Respondent should have ceased when he declined to answer Detective Cowie's questions. The Michigan Court of Appeals relied upon the following language in *Miranda* v *Arizona, supra,* in reaching its conclusion:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown

[9] The Petitioner notes that Respondent Mosley's trial testimony differed in material respects from his testimony at the pretrial suppression hearing. At trial defendant Mosley asserted that he categorically denied any involvement in the murder and alleged that he chose to exercise his rights (R. 561) during the homicide inquiry. Respondent denied the truth of the contents of his confession (R. 564-565) and in fact denied ever making a statement to Hill (R. 577). Rather, Respondent alleged that the confession was entirely the work-product of Sergeant Hill (R. 585-586) and that he did not read its contents (R. 581) and he signed it only because he didn't want to go to jail for life for something he didn't do. By signing, he asserted at trial, he was assured that he would be charged only with manslaughter despite the fact that all the while he proclaimed his innocence to Hill (R. 561-564, 573-577).

> that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of incustody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." (Petition for Writ of Certiorari, pp. 12-13).

SUMMARY OF ARGUMENT

The Michigan Court of Appeals, relying on *Miranda* v *Arizona,* and *Westover* v *United States,* ruled that a person being questioned about a crime cannot waive the right to remain silent once it has been invoked and cannot be interrogated at any time after exercise of that right.

Petitioner contends that such an interpretation of those cases is patently offensive to both the letter and spirit of those rulings. What the *Miranda* rule sought to establish were safeguards that would protect the constitutional rights of an accused during custodial interrogation. The *Miranda* rule was intended to ensure that an accused was fully and effectively advised of his rights to counterbalance the "inherently compelling pressures" of custodial interrogation. However, as long as the *Miranda* rights are given and the accused is given an opportunity to exercise them, those rights, as with any other constitutional privileges, may be waived if the waiver is a knowing and voluntary one.

Specific provision for the admissibility of the statement in this case is found in *Miranda v. Arizona* as well as *Westover* v *United States.* The court, in *Miranda,* said that an express statement that an accused was willing to make a

statement followed closely by a statement could constitute a waiver. That is precisely the case now before the Court. Detective Hill's testimony as well as that of the Respondent clearly shows that the statement made was the result of "one continuous action" that followed an express waiver of the right to remain silent.

Miranda also indicated that even if interrogation in a given case continued after a request for counsel, a subsequent waiver of that right could nevertheless be shown by the government. If the right to counsel could be waived after an initial request for an attorney, then this Court did not intend to establish a *per se* exclusionary rule once a right under *Miranda* was exercised.

The case now before this Court was also provided for by specific language in *Westover* which said that a "different case" would be presented if an accused were questioned by a second authority in different surroundings and was first adequately advised of his rights. The facts of the present case fall within the mentioned provision since Hill's questioning was removed both in time and place from Detective Cowie's and was conducted only after the *Miranda* rights were given and a waiver obtained.

In addition, none of the evils sought to be prevented by *Miranda* and *Westover* appear here. No overbearing conduct by the police, no long incommunicado questioning, and no disregard of the accused's rights exists in this case. In these circumstances wherein Respondent was accorded all of his rights and the interrogation was reasonable, the statement of Respondent is not barred by either *Miranda* or *Westover*.

The position of the State of Michigan is supported almost unanimously by those courts, both state and federal, which have considered the question.

Reversal of the Michigan Court would in no manner diminish the rights already granted an accused but would, rather, support common-sense as well as efficient investigation of crime.

Neither *Miranda* nor *Westover* preclude interrogation by a separate bureau relative to a separate crime as was the case here.

ARGUMENT

I.

AN ACCUSED WHO HAS ONCE INVOKED HIS RIGHT TO REMAIN SILENT, MAY SUBSEQUENTLY WAIVE HIS MIRANDA RIGHTS PRIOR TO A LATER INTERROGATION WHICH IS CONDUCTED FOR GOOD FAITH REASONS IN A NON-COERCIVE MANNER AND IS NOT INITIATED FOR THE PURPOSE OF UNDERMINING THE RIGHT PREVIOUSLY EXERCISED.

The Michigan Court of Appeals in the instant case held that Respondent could not be interrogated subsequent to his election to remain silent to Detective Cowie's questioning. All interrogation thereafter, the appellate court held, was barred by *Miranda v Arizona*, 384 US 436, 473-474; 86 S Ct 1602, 1627-1628; 16 L Ed 2d 694, 723 (1966), wherein it was stated:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the

> right to cut off questioning; the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked."

Thus, the Michigan Court held that the subsequent interrogation conducted by Homicide Detective Hill was prohibited by the dictates of *Miranda,* and a companion case, *Westover* v *United States,* 384 US at 494; 86 S Ct at 1638; 16 L Ed 2d at 735 (1966). The appellate court therefore ordered the Respondent's confession suppressed as evidence. *People* v *Mosley,* 51 Mich App 105; 214 NW 2d 564 (1974); (Petition for Writ of Certiorari, Appendix "A").

The Petitioner contends that the opinion of the Michigan appellate tribunal is a clearly erroneous interpretation of the *Miranda* rule as well as of the *Westover* holding. The Michigan Court's interpretation, Petitioner asserts, is contrary to the purpose of the *Miranda* rule and the proper application of that rule. Moreover, the lower court's interpretation offends a common-sense approach to effective and efficient law enforcement.

A. The Purpose Underlying the Miranda Rule was Fully Respected in the Instant case.

The purpose of the rule fashioned by this Court in *Miranda* was to establish appropriate safeguards to ensure that in-custody interrogation was carried out in an atmosphere in which an accused can effectively exercise the full panoply of rights granted him by the federal constitution, including the right against compulsory self-incrimination. 384 US 436, 458, 465, 467-469, 473-474, 478-480; 86 S Ct 1602, 1619, 1623, 1624-1625, 1627, 1630-1631.

In the words of this Court:

> "We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." 384 US at 467; 86 S Ct at 1624.

The *Miranda* rule was intended to be prophylactic in effect, to provide "practical reinforcement for the right against compulsory self-incrimination." *Michigan* v *Tucker,* 417 US 433; 94 S Ct 2357; 41 L Ed 2d 182, 193 (1974).

The Petitioner asserts that the purpose underlying the *Miranda* rule was fully effectuated in this case and no breach of Respondent's Fifth Amendment rights is extant when the facts surrounding the interrogation in question are considered.

Respondent was arrested specifically for the robberies of the Blue Goose Bar and the White Tower Restaurant, both perpetrated on Detroit's east side (A. 12). The initial interrogation of Respondent by Detective Cowie focused solely on those robberies (A. 9, 16-17). That initial interrogation session, twenty minutes in length,[10] was immediately terminated after Respondent exercised his right to remain silent pursuant to the *Miranda* warnings which were given him (A. 13-14).

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[10] See footnote 4, *supra.*

The prompt cessation of questioning by Cowie, Petitioner states, clearly illustrated to Respondent, consonant with the mandate of this Court,[11] that his right to refrain from answering questions would be fully respected.[12]

Two and one-half hours later Respondent Mosley was taken from the lockup area to the homicide bureau by Detective Hill and informed that he was there for the purpose of questioning in regard to the Leroy Williams murder. Prior to any questioning Hill apprised Respondent of his rights in such detail that Hill's good faith attempt to comply fully with both the letter and spirit of *Miranda* clearly appears.[13]

The purpose of the interrogation was not to undermine appellant's earlier exercise of his right to remain silent.[14] Rather, Hill was investigating the Leroy Williams case about which he had just received information naming Respondent as the shooter (A. 28-29, 31-32, 34).

Thus Hill's interrogation of Respondent Mosley was not in any manner coercive nor was it a continuation of

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[11] 384 US 436 at 477; 86 S Ct 1602 at 1629.

[12] See, e.g., *State* v *McClelland*, — Iowa — at —; 164 NW 2d 189 at 193 (1969); *State* v *Godfrey*, 182 Neb 451 at 455; 155 NW 2d 438 at 441 (1968), cert den 392 US 937; *United States* v *Collins*, 462 F2d 792, 797 (2d Cir, 1972), cert den 409 US 988, 93 S Ct 343, 34 L Ed 2d 254 (1972).

[13] See footnote 5, *supra;* (A. 25-28, 42-43; R. 560-561).

[14] Indeed, Cowie testified that he did not inform Hill of Respondent's election to remain silent (A. 16); and Hill stated that as far as he knew Respondent had "denied implications" (sic) relative to the robberies. Hill further testified that Cowie told him that he, Cowie, had advised Respondent of his rights and that the *Miranda* warning form was used by him (A. 23).

Cowie's interrogation;[15] and it was not intended to break down the exercise of the previously employed right.[16]

The short period of questioning with the detailed delineation of Respondent's rights, clearly demonstrates that not only did Hill's proceeding combat the "compelling pressures" inherent in in-custody interrogation, 384 US at 467; 86 S Ct at 1624, but, it also created an atmosphere wherein the statements of defendant Mosley could only be the result of voluntariness, both in the traditional sense, *Michigan* v *Tucker, supra*, 417 US 433 at—, 94 S Ct 2357 at 2362, and within the framework established by *Miranda*, 384 US at 478-479; 86 S Ct at 1630.

B. The Miranda Rule was Erroneously Applied in the Instant Case in View of Specific Provisions in Miranda v Arizona.

Petitioner further contends that the facts in the present case fall within two particular provisions of *Miranda* so that the confession of Respondent should have been held admissible by the Michigan Court.

In *Miranda* this Court stated:

> "An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver." 384 US at 475, 86 S Ct at 1628.

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[15] In fact, Cowie asked no questions about the Williams murder since that case belonged to a separate bureau and since Homicide Detective Hill knew the facts contained in that file (A. 9, 16-17).

[16] See, e.g., *People* v *Pittman*, 55 Ill 2d 39; 302 NE 2d 7 (1973); *Conway* v *State*, 7 Md App 400; 256 A2d 178 (1969); *Sergent* v *People*, en banc, 177 Colo 354; 497 P2d 983 (1972); *Jennings* v *United States*, 391 F2d 512 (5th Cir, 1968), cert den 393 US 868; 89 S Ct 21; 21 L Ed 2d 136 (1968).

Here, Detective Hill testified that Respondent did not request an attorney, but, rather, signed the rights form and after an initial denial made his statement (A. 29, 32-33). No long interrogation prior to the confession was conducted (A. 29), nor, in the words of the Respondent, were there any physical or verbal threats used to obtain the confession (R. 580).

In fact, Hill testified that his obtaining the confession was

> ". . . one continuous action; this form was signed at 6:35, and we went right through it" (A. 29).

Thus the Petitioner contends that given the short period of questioning which preceded the giving of the confession, the absence of any showing of coercion, the waiver provision contemplated by this Court referred to above should be held applicable to this case.

Moreover, this Court also stated in *Miranda* that, conceivably an interrogation which continued after a request for counsel could yield a voluntary statement, given a proper case:

> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." 384 US at 475; 86 S Ct at 1628.

If the Court could permit a defendant to waive his right to counsel after exercising it, then it could not have intended to preclude a subsequent waiver of any other right co-equal to that granted by the Sixth Amendment. A defendant's Fifth Amendment right must be similarly able to be waived, even if invoked initially. Furthermore since the language in

Miranda cited above referred to the *same* interrogation, a waiver should clearly be proper at a separate inquiry at a later time. *United States* v *Collins,* 462 F 2d 792 (2d Cir, 1972), *(en banc) cert den* 409 US 988; 93 S Ct 343.

Therefore, Petitioner asserts that under *Miranda,* and without resort to any other citation, Respondent should be held able to waive his right to remain silent after initially invoking it, as long as that waiver is knowingly and intelligently made. *Miranda* v *Arizona,* 384 US at 475; 86 S Ct at 1628. Based on Detective Hill's recitation of events leading up to the confession[17] and Respondent's corroboration of them (A. 42-44; R. 580), under the traditional rules regarding "waiver", Respondent knowingly and intelligently waived his *Miranda* rights. *Johnson* v *Zerbst,* 304 US 458; 58 S Ct 1019; 82 L Ed 1461 (1938); *Adams* v *United States,* 317 US 269; 63 S Ct 236; 87 L Ed 268 (1942).

C. The Michigan Court of Appeals Misinterpreted and Misapplied the Rule Derived From Westover v United States, Companion Case to Miranda v Arizona.

Petitioner contends that the holding of the Michigan court[18] which found the procedure utilized in this case offensive to the rule of *Westover* v *United States,* 384 US at 494; 86 S Ct at 1638; 16 L Ed 2d at 735 (1966), is clearly erroneous and failed to properly interpret and apply the lesson of that case.

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[17] See footnote 5, *supra.*

[18] Petition for Writ of Certiorari, Appendix A, p. 13.

In *Westover,* no warnings were given to the defendant by the local police prior to his being questioned for some fourteen hours. The FBI interrogation began immediately after the Kansas City police concluded. No showing was made that an "articulated waiver of rights" was made by the suspect prior to the FBI questioning. Moreover, this Court found that, given the procedure of continuous interrogation, from the accused's standpoint the warnings came at the end of the interrogation process and not at the beginning. This Court then stated, based on the circumstances:

> " . . . an intelligent waiver of constitutional rights cannot be *assumed.*" (Emphasis supplied.) 384 US at 496; 86 S Ct at 1639.

In the instant case, totally unlike the *Westover* example, Respondent was questioned initially for only a brief time after being thoroughly informed of his rights. In fact, the exercise of one of those rights reveals his understanding of them (R. 558-559). Then, after a 2½ hour interim, Respondent was queried in a different bureau area, by a different detective regarding a crime separate and distinct from that of the first inquiry. Respondent's understanding of these changed circumstances clearly appears in the record (A. 25-28, 42-43; R. 560-561). Respondent was informed again of his rights and a signed Notification of Rights Form was executed after a thorough delineation of the rights contained therein (A. 25-29).

In these circumstances, the Petitioner asserts, none of the evils sought to be cured by *Westover* appears. Rather, there was a non-coercive interrogation and a specific recitation of the *Miranda* warnings. Unlike in *Westover,* Respondent's knowing and intelligent waiver of his rights is demonstrated by the record. No "assumption" of waiver is proffered here, as was done in *Westover.*

In addition, Petitioner contends that the precise case now before this Court was specifically allowed for in *Westover:*

> "We do not suggest that law enforcement authorities are precluded from questioning any individual who has been held for a period of time by other authorities and interrogated by them without appropriate warnings. A different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them." 384 US at 496; 86 S Ct at 1639.

Therefore, Petitioner maintains, Respondent's confession was constitutionally procured.

D. The Opinion of the Michigan Court of Appeals is in Conflict With Decisions of Other Courts, Both State and Federal, Which Have Considered the Question Now Before this Court.

Petitioner notes that the other courts which have considered the question now before this Court almost unanimously adhere to the position of the State of Michigan, that an accused may be interrogated after the exercise of the right to remain silent or the right to counsel as long as such inquiry is not for the purpose of subverting the right previously invoked.[19]

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[19] See, e.g., State Courts:

(1) California: *People* v *Duran,* 269 Cal App 2d 112; 74 Cal Rptr 459 (Cal App 1969); *People* v *Lyons,* 18 Cal App 3d 760; 96 Cal Rptr 76 (1971).

(*continued on next page*)

In *Hill* v *Whealon*, 490 F2d 629 (6th Cir, 1974), a case precisely on point with the instant one, the Sixth Circuit Court of Appeals held that a defendant's initial exercise of his right to remain silent did not preclude the accused

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(*continued from preceding page*)

(2) Colorado: *Dyett* v *People*, 177 Colo 370; 494 P2d 94 (en banc) (1972); *Sergent* v *People*, 177 Colo 354; 497 P2d 983 (en banc) (1972).

(3) Illinois: *People* v *White*, 22 Ill 3d 180; 317 NE 2d 323 (1974); *People* v *Pittman*, 55 Ill 2d 39; 302 NE 2d 7 (1973).

(4) Iowa: *State* v *McClelland*, — Iowa —; 164 NW 2d 189 (1969).

(5) Kansas: *State* v *Law*, 214 Kan 643; 522 P2d 320 (1974).

(6) Maryland: Conway v State, 7 Md App 400; 256 A2d 178 (1969).

(7) Minnesota: *State* v *O'Neill*, — Minn —; 216 NW 2d 822 (1974).

(8) Nebraska: *State* v *Moore*, 189 Neb 354; 202 NW 2d 740 (1972); *State* v *Godfrey*, 182 Neb 451; 155 NW 2d 438 (1968), cert den 392 US 937.

(9) New York: *People* v *Gary*, 31 NY 2d 68; 286 NE 2d 263 (1972).

(10) North Carolina: *State* v *Bishop*, 273 NC 283; 158 SE 2d 511 (1968).

(11) Oklahoma: *Penn* v *State*, 456 P2d 606 (Okla Crim, 1969).

(12) Pennsylvania: *Commonwealth* v *Grandison*, 449 Pa 231; 296 A2d 730 (1972).

(13) South Dakota: *State* v *Robinson*, 209 NW 2d 374 (1973).

(14) Texas: *Gunter* v *State*, 477 SW 2d 557 (Ct of Crim App 1972); *Hill* v *State*, 429 SW 2d 481 (Tex Crim App 1968), cert den 393 US 955; 89 S Ct 384; 21 L Ed 2d 367 (1968).

(15) Washington: *State* v *Emmett*, 77 Wash 2d 520; 463 P2d 609 (1970).

(16) Wisconsin: *State* v *Estrada*, 63 Wis 2d 476; 217 NW 2d 359 (1974).

See also *State* v *Higginbothom*, 261 La 983; 261 So 2d 638 (Louisiana 1972), and *Sullins* v *State*, 448 SW 2d 96 (Ct of Crim App Tenn 1969).

(*continued on next page*)

from waiving it subsequently when he was informed by detectives that a statement had been obtained by another person naming him in a homicide. In passing on defendant's allegation that further inquiry should have been precluded by *Miranda*, the Sixth Circuit said:

> "The question to be determined in this case, as in other cases involving *Miranda* warnings, is whether the prosecution has carried its "heavy burden" of establishing that Hill was advised effectively of his rights and whether his confession was made knowingly and voluntarily.
>
> "We agree with the language of Judge Matthes in *Hughes* v *Swenson*, 452 F2d 866, 868 (8th Cir, 1971):
>
> 'It is neither necessary nor desirable to undertake to fashion a per se rule to be applied in all cases presenting the *Miranda* issue. The crucial

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(*continued from preceding page*)

Federal Courts:

(1) Second Circuit: *United States* v *Collins*, 462 F2d 792 (en banc) (1972, 2d Cir), cert den 409 US 988; 93 S Ct 343; 34 L Ed 2d 254 (1972); *United States* v *Brady*, 421 F2d 681 (1970, 2d Cir).

(2) Fifth Circuit: *Jennings* v *United States*, 391 F2d 512 (1968, 5th Cir), cert den 393 US 868; 89 S Ct 154; 21 L Ed 2d 136 (1968); *Narro* v *United States*, 370 F2d 329 (1966, 5th Cir), cert den 387 US 946; 87 S Ct 2081; 18 L Ed 2d 1334 (1966).

(3) Sixth Circuit: *Hill* v *Whealon*, 490 F2d 629 (1974, 6th Cir).

(4) Ninth Circuit: *Coughlin* v *United States*, 391 F2d 371 (1968 9th Cir) cert den 393 US 870; 89 S Ct 159, 21 L Ed 2d 139.

(5) District Courts: (a) *McIntyre* v *State of New York*, 329 F Supp 9 (ED NY 1971).

(b) *United States* v *Hatchel*, 329 F Supp 113 (Mass 1971); 1971);

(c) *United States* v *Barnawell*, 341 F Supp 619 (SD Cal 1972).

question always must be: has the prosecution sustained its heavy burden of demonstrating that the defendant was effectively advised of his rights, and did he knowingly and understandingly decline to exercise them?' " 490 F2d at 630.

The Supreme Court of Minnesota similarly decided a case on point with the present one. In *State* v *O'Neill*, —— Minn——, 216 NW 2d 822 (1974), defendant therein was arrested for a gun ordinance violation. Subsequently, one of his companions implicated him in a homicide. An attempt to interview him was met by a violent outburst which the court found to be an expression of his exercise of the right to remain silent. The interrogation was then terminated. About two hours later the defendant was again approached, given his rights, and told of the implicating statement made by his companion. Defendant then made an admission. The Minnesota court in ruling the procedure proper under *Miranda* stated:

"We hold that it is not improper for the police to approach a defendant after his initial refusal to cooperate and ask him to reconsider his silence. As long as the urging to reconsider is not in any manner compulsive on a defendant and respects his asserted right not to speak, it is not constitutionally prohibited. This method is especially appropriate when, as here, a defendant's initial indication of a desire to remain silent is given before he has been fully apprised of the situation." 216 NW 2d at 829. Accord: *State* v *Godfrey*, 182 Neb 451; 155 NW 2d 438 (1968), *cert den*, 392 US 937."

And in *Jennings* v *United States*, 391 F2d 512, 515-516 (5th Cir, 1968), *cert den* 393 US 868; 89 S Ct 154; 21 L Ed 2d 136 (1968), the federal appellate court in an appeal based on a claim that *Miranda* and *Westover* were violated, summarized its reasons for holding a confession to federal authorities admissible after the accused exercised his right to remain silent before the local authorities in Florida:

"We do not agree with these contentions. It seems clear to us that what the Court sought to interdict in *Miranda* were those situations in which a person has indicated his desire to exercise his constitutional right to silence but the police refuse to take "no" for an answer. Disregarding his constitutional claim, they continue to ask questions, see 384 US at 453, 86 S Ct 1602, 16 L Ed 2d 694. These techniques were not used in this case. It is admitted that the local police ceased interrogation immediately upon appellant's expression of an unwillingness to proceed further.

In *Westover*, the defendant was arrested by local police. With no preliminary warning of his rights, they kept him in custody for over fourteen hours and interrogated him at length during that period. They obtained no statement. The FBI interrogation began immediately and was conducted in the same police headquarters. The Supreme Court said, 'Despite the fact that FBI agents gave warnings at the outset of the interview, from Westover's point of view the warning came at the end of the interrogation process. In these circumstances an intelligent waiver of constitutional rights cannot be assumed'. On the other hand, Jennings was first thoroughly warned by the Fort Pierce police.

> He found out that immediately upon expressing an unwillingness to proceed the interrogation would promptly stop. He had been in custody only about an hour, and the questioning had been brief. When the FBI agent repeated the warnings, appellant for some reason satisfactory to himself, failed to express the same unwillingness theretofore exercised against the local police. The situation lacks a long way of coming within the *Westover* rule."

Accord: *United States* v *Collins,* 462 F2d 792 (2nd Cir, 1972) *(en banc) cert den* 409 US 988; 93 S Ct 343; 34 L Ed 2d 254 (1972); *United States* v *Brady,* 421 F2d 681 (2d Cir, 1970); *State* v *Law*, 214 Kan 643; 522 P2d 320 (1974); *State* v *Emmett,* 77 Wash 2d 520; 463 P2d 609 (1970); *Commonwealth* v *Grandison,* 449 Pa 2d 231; 296 A2d 730 (1972). (See also footnote 19 and cases cited there.)

A review of the above-cited cases and the reasoning therein, Petitioner states, discloses the propriety of the interrogation in the instant case.

E. The Interpretation Given Miranda v Arizona and Westover v United States by the Michigan Court of Appeals Offends a Common Sense Approach to Effective and Efficient Law Enforcement.

Should the Michigan court's interpretation of *Miranda* be permitted to stand, the effective and efficient investigation of criminal behavior will suffer a serious setback with no counterbalancing benefit to the public at large.

Here, both officers involved in this matter scrupulously followed, in both the letter and spirit, what a common-sense reading of *Miranda* requires, *i.e.*, respect for the constitutional rights intended to be guarded thereby. No overbearing conduct by the police appears; no long incommunicado interrogation; no refusal to abide by the wishes of the Respondent.[20] In short, the behavior of the police in this case reveals a conscientious effort to fully and faithfully honor the rights of the accused while attempting to carry out the duties vested in them as officers of the law.

If the practice and procedure utilized in this case are held to violate *Miranda* and *Westover,* then, in any similar case, law enforcement authorities would be precluded from questioning any individual who previously exercised his right to remain silent, irrespective of the crime involved and irrespective of the reasons for the proposed interrogation.

Such a result would offend a logical approach to the investigation of crime and would prevent the solution of crimes such as the instant one.

Here, Detective Hill was the investigator heading a homicide inquiry (R. 459, 529). After talking with Anthony Smith on the date of Respondent's confession and being told Respondent was the shooter in the murder, Hill proceeded to question defendant Mosley. Smith denied any complicity in the crime. Detective Hill stated that he didn't feel that the murder was solved. Thus Hill explains his questioning of Respondent as follows:

> " . . . I told him they were charged with Murder, and I told him that all we had at that time was Anthony Smith's statement, and Anthony Smith said he was the man with the gun.
>
> "And I also told him that as far as we know

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[20] See *State* v *Godfrey,* 182 Neb 451; 155 NW 2d 438, 440 (1968) cert den 392 US 937; *Jennings* v *United States,* 391 F2d 512, 515 (5th Cir 1968), cert den 393 US 868.

for sure, since we were not there, Anthony Smith might have been the man with the gun.

"The Court: You say Anthony Smith might have been the man with the gun?

"[Detective Hill]: Yes, sir. (A. 33)." See also (R. 497).

If Hill were precluded from questioning defendant Mosley, then the police, who had no other witnesses, would have had to decide whether to believe the possibly self-serving statement of a co-felon without any attempt at corroboration or disproof. In such a setting, efficient and reasonable law enforcement requires the opportunity to at least attempt further inquiry. That inquiry could work to the benefit of the accused as well as to his possible detriment. For as was said in dissent to the original *Miranda* rule:

> "The fact is that he may not be guilty at all and may be able to extricate himself quickly and simply if he were told the circumstances of his arrest and were asked to explain." *Miranda* v *Arizona,* (Mr. Justice White dissenting), 384 US at 543; 86 S Ct at 543.

Petitioner further states that reversal of the Michigan court would not diminish the rights already granted an accused. All he or she need do if questioned further would be to reiterate the right previously invoked— a small inconvenience compared to the cost sought to be levied by the Michigan court's decision.

ARGUMENT

II.

THE INVOCATION OF THE RIGHT TO REMAIN SILENT RELATIVE TO ONE CRIME DOES NOT PRECLUDE INTERROGATION VIS-A-VIS A SEPARATE CRIME.

The decision of the Michigan Court of Appeals in effect precludes the investigation and interrogation of a suspect relative to crimes separate and distinct from that to which the accused previously exercised his right against compulsory self-incrimination.[21] Petitioner contends that such a holding does not properly derive from *Miranda* v *Arizona*[22] and *Westover* v *United States,*[23] as was found by the appellate court. Indeed, such a result patently offends the rules of those cases.

Nowhere in the cases relied upon by the Michigan court is a rule to be found which precludes subsequent interrogation that does not have as its purpose the circumvention or abrogation of an accused's rights.

The precept emanating from *Miranda,* Petitioner states, is that a defendant's constitutional rights can be effectively protected by the giving of the warnings therein enumerated —unless other circumstances override and negate the procedural safeguards.[24] And as long as those rights are honorded by the interrogating authority, an accused may be

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[21] *People* v *Mosley,* 51 Mich App 105; 214 NW 2d 564 (1974); Petition for Writ of Certiorari, Appendix A, pp 11-13.

[22] 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[23] 384 US at 494; 86 S Ct 1638; 16 L Ed 2d at 735 (1966).

[24] 384 US at 467; 86 S Ct at 1624.

questioned if a knowing and intelligent waiver of the rights is first obtained.[25]

Miranda's intent was to insure that the accused's right to terminate any questioning was protected and to further preclude the interrogator from failing to take "no" for an answer:

> "Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked."[26]

In *Jennings* v *United States,*[27] the Fifth Circuit held admissible a confession made to federal authorities subsequent to exercise of the right to remain silent before local authorities. In answer to a claim that the later federal interrogation was prohibited by *Miranda* and *Westover,* the court stated:

> "We do not agree with these contentions. It seems clear to us that what the Court sought to interdict in *Miranda* were those situations in which a person has indicated his desire to exercise his constitutional right of silence but the police refuse to take "no" for an answer. Disregarding his constitutional claim, they continue to ask questions, see 384 U.S. at 453, 86 S Ct 1602, 16 L Ed 2d 694. These techniques were not used in this case. It is admitted that the local police ceased interrogation

[25] 384 US at 479; 86 S Ct at 1630.

[26] 384 US at 474; 86 S Ct at 1628.

[27] 391 F2d 512, 515-516 (5th Cir 1968), cert den 393 US 868; 89 S Ct 154.

immediately upon appellant's expression of an unwillingness to proceed further.

"In *Westover,* the defendant was arrested by local police. With no preliminary warning of his rights, they kept him in custody for over fourteen hours and interrogated him at length during that period. They obtained no statement. The F.B.I. interrogation began immediately and was conducted in the same police headquarters. The Supreme Court said, "Despite the fact that F.B.I. agents gave warnings at the outset of the interview, from Westover's point of view the warning came at the end of the interrogation process. In these circumstances an intelligent waiver of constitutional rights cannot be assumed". On the other hand, Jennings was first thoroughly warned by the Fort Pierce police. He found out that immediately upon expressing an unwillingness to proceed the interrogation would promptly stop. He had been in custody only about an hour, and the questioning had been brief. When the F.B.I. agent repeated the warnings, appellant for some reason satisfactory to himself, failed to express the same unwillingness theretofore exercised against the local police. The situation lacks a long way of coming within the *Westover* rule. There was no error in the admission of the statement obtained by the F.B.I."

Accord: e.g., *Hill* v *Whealon,* 490 F2d 629 (6th Cir 1974); *United States* v *Collins,* 462 F2d 792, 802 (2nd Cir 1972) *(en banc) cert den* 409 US 988; 93 S Ct 343 (1972); *Commonwealth* v *Grandison,* 449 Pa 231; 296 A2d 730 (1972); *Sergent* v *People,* 177 Colo 354; 497 P2d 983 (1972); *People* v *Gary,* 31 NY 2d 68; 286 NE 2d 263 (1972); *Conway* v *State,* 7 Md App 400; 256 A2d 178 (1969).

In the instant case Petitioner states that no showing can be made that the questioning of Respondent was for any purpose other than good faith police investigation; and no showing can be made that the rights of Respondent were disregarded or overborne. Therefore based on precise language in *Westover,* Petitioner asserts that the procedure in this case has been allowed for by this court. For as this court said:

> "We do not suggest that law enforcement authorities are precluded from questioning any individual who has been held for a period of time by other authorities and interrogated by them without appropriate warnings. A different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them."[28]

Respondent herein was removed both in place and time from his initial interrogation and was twice informed of his rights (A. 7, 25-28). Moreover, the second officer, Hill, clearly informed Respondent that his interrogation regarded a crime separate from the earlier interrogation (A. 22, 31). And Respondent acknowledged his understanding of these circumstances (R. 500, Cf. R. 558-559 and 560-561).

The interrogation in the instant case, unlike in *Westover,* did not involve continuous questioning so that defendant's rights could not be protected by the giving of the requisite warnings.[29]

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[28] *Westover* v *United States,* 384 US at 496; 86 S Ct at 1639.

[29] *Westover* v *United States,* 384 US at 496; 86 S Ct at 1639.

Rather the circumstances surrounding the interrogation clearly evidence an atmosphere wherein Respondent's statements could only be the product of free choice.

To accept the position of the Michigan Court of Appeals here would require, as the Supreme Court of Iowa has noted:

> " . . .an ironclad rule prohibiting police officers from subsequently inquiring of a defendant who has invoked his right to silence whether he wishes at any time to waive that right. Certainly a defendant has a right to reconsider and change his decision in the matter. We do not believe *Miranda* goes so far as to exclude all answers to questions put to defendants after they have claimed their right to remain silent. This is particularly true under a record, as here, which is clearly demonstrative of the wholly voluntary nature of the given response. To hold otherwise would overlook the realities of efficient and practical criminal investigation."[30]

An ironclad rule prohibiting the interrogation by Hill would only serve to undermine reasonable efforts aimed at investigating crime.

Barring Hill's questioning of Respondent would mean that law enforcement authorities could not question a suspect even though that suspect had never indicated an unwillingness to talk about the crime at issue. Such a result, Petitioner claims, is not within the purview of either *Miranda* or *Westover.*

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[30] *State* v *McClelland,* — Iowa —; 164 NW 2d 189, 193 (1969).

CONCLUSION

Wherefore, the Petitioner concludes that this Court should reverse the decision of the Michigan Court of Appeals; hold that the Respondent knowingly and intelligently waived his *Miranda* rights; and affirm Respondent's conviction for First Degree Murder.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-653

THE STATE OF MICHIGAN,
Petitioner,

vs

RICHARD BERT MOSLEY,
Respondent.

BRIEF FOR RESPONDENT

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Argument:

A.

Under the totality of circumstances—including the illegal arrest of respondent because of lack of probable cause, the violation by the police of state law in failing to take respondent before a judge without unnecessary delay after his arrest so that he might be informed of his rights by the judge, the exercise by respondent of his right to remain silent during custodial interrogation, the "turning over" of respondent by the first interrogating officer to another for the purposes of further interrogation without the first officer's informing the second officer that respondent had exercised his right to remain silent, the confronting of respondent by the second officer with a "confession" of a purported accomplice which was not a confession, and the age of respondent of 18 years—the prosecution did not carry its heavy burden of proving a waiver by respondent to remain silent before a confession was elicited from him 17

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QUESTIONS PRESENTED

A.

WHETHER UNDER THE TOTALITY OF THE CIRCUMSTANCES—INCLUDING THE ILLEGAL ARREST OF RESPONDENT BECAUSE OF LACK OF PROBABLE CAUSE, THE VIOLATION BY THE POLICE OF STATE LAW IN FAILING TO TAKE RE-

SPONDENT BEFORE A JUDGE WITHOUT UNNECESSARY DELAY AFTER HIS ARREST SO THAT HE MIGHT BE INFORMED OF HIS RIGHTS BY THE JUDGE, THE EXERCISE BY RESPONDENT OF HIS RIGHTS, TO REMAIN SILENT DURING CUSTODIAL INTERROGATION, THE "TURNING OVER" OF RESPONDENT BY THE FIRST INTERROGATING OFFICER TO ANOTHER FOR PURPOSES OF FURTHER INTERROGATION WITHOUT THE FIRST OFFICER'S INFORMING THE SECOND OFFICER THAT RESPONDENT HAD EXERCISED HIS RIGHT TO REMAIN SILENT, THE CONFRONTING OF RESPONDENT BY THE SECOND OFFICER WITH A "CONFESSION" OF A PURPORTED ACCOMPLICE WHICH WAS NOT A CONFESSION, AND THE AGE OF RESPONDENT OF 18 YEARS—THE PROSECUTION CARRIED ITS HEAVY BURDEN OF PROVING A WAIVER BY RESPONDENT TO REMAIN SILENT BEFORE A CONFESSION WAS ELICITED FROM HIM.

B.

WHETHER A STATE COURT DECISION SHOULD BE OVERTURNED BY THIS COURT IF IT CAN BE JUSTIFIED UNDER STATE LAW AND THE DECISION DOES NOT CONTRAVENE CONSTITUTIONAL STANDARDS SET BY THIS COURT.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." *Fifth Amendment to the Constitution of the United States.*

"No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." *Article 1, Section 17, Michigan Constitution of 1963.*

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *Fourth Amendment to the Constitution of the United States.*

"The person, houses, papers and possessions of every person shall be secure from unreasonable

searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation." *Article 1, Section 11, Michigan Constitution of 1963.*

"A peace officer who has arrested a person for a felony without a warrant must without unnecessary delay, take the person arrested before the most convenient magistrate of the county in which the offense was committed, and must make before the magistrate a complaint, stating the offense for which the person was arrested." *Mich Comp Laws Ann 764.13.*

"Every person charged with a felony shall, without unnecessary delay after his arrest, be taken before a magistrate or other judicial officer and, after being informed as to his rights, shall be given an opportunity publicly to make any statement and answer any questions regarding the charge that he may desire to answer." *Mich Comp Laws Ann 764.26.*

STATEMENT OF THE CASE

Respondent was accused of and convicted of the murder of one Leroy Williams during the perpetration of a robbery of him.

The sole evidence against respondent at trial was his confession and the testimony of a purported accomplice who had been granted immunity for his testimony. This purported accomplice was Anthony Smith.

Leroy Williams, the victim of the hold-up slaying, was slain in the first week of January, 1971 (A. 5).* Respondent was arrested on April 8, 1971 at 1:05 pm in front of his residence (A. 4). The police officer who arrested respondent did not have a warrant for his arrest (A. 11). The sole and exclusive basis which the arresting officer had for the arrest of respondent was a certain anonymous telephone call which he had received (A. 12).

The arresting officer was Sergeant Cowie. He received the anonymous telephone call a day or more before the day of arrest, he couldn't be sure, and some time between 8:00 am and 4:00 pm since he was working days (A. 11). He made no notes of the anonymous telephone conversation (A. 11). Cowie didn't know who the anonymous caller was and had never heard his voice before (A. 6).

The anonymous caller told Cowie the names of "several persons that were operating on the lower east side, holding up places" (A. 4, 5), and the caller gave the names of respondent, Anthony Smith, Charles Little, Ernest Thompson and Richard Christian (A. 5). The caller mentioned as specific places that the named persons might have held up the Blue Goose Bar and Leroy Williams (A. 5). Leroy Williams was allegedly held up in front of the 101 Ranch Bar.

Cowie said that he had arrested respondent for investigation of robbery armed of the Blue Goose Bar and the White Tower Restaurant, both mentioned by the anonymous caller (A. 12). Respondent was taken to police headquarters (A. 6). He arrived there at 2:15 pm (A. 12). Cowie did

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* The A in the parentheses refers to the Appendix filed in this case; the numbers, to the pages within.

not apply for a warrant of arrest for respondent for the Blue Goose Bar because "it was learned he was not involved" (A. 12), and he didn't apply for a warrant for the robbery of the White Tower Restaurant because he had not talked to respondent and he felt that he needed more information before he applied for a warrant (A. 12, 13).

Cowie could have taken respondent before a judge of Recorder's Court for the City of Detroit [located directly across the street from police headquarters] between 2:15 pm and 4:30 pm of the day of arrest but did not because he hadn't completed his investigation (A. 13).

Instead, Cowie began questioning respondent about 2:30 pm and he finished about 4:00 pm (A. 10). Cowie talked to respondent "in regards to several robberies that had been committed in the lowest east side, out around the vicinity of Mack and the Hillger area" (A. 9). Cowie said he did not question respondent about the robbery and murder [of Leroy Williams] at the 101 Ranch Bar at 3401 Hillger (A. 9).

At the time of his arrest, respondent was 18 years old (A. 41). Cowie started to talk to respondent on the day of arrest at 2:30 pm and he was "finished" at 4:00 pm but he didn't talk to respondent continuously during this time (A. 14). Cowie talked to respondent for about 20 minutes after 2:30 pm (A. 14). It was during this 20 minute segment that respondent declined to answer questions (A. 15). Respondent "declined to answer" "[a]nything about the robberies" (A. 13). The second time that Cowie spoke to respondent, at 4:00 pm or 4:30 pm, it was "just to inform him that I was turning him over to the Homicide Bureau and Sergeant Hill" (A. 15). In between these two times that Cowie spoke to respondent, Cowie spoke to Anthony

Smith (A. 15). Respondent and Anthony Smith were spoken to by Cowie separately and one did not hear what the other had been asked by Cowie (A. 15). Of course, Anthony Smith was in custody as a result of having been arrested.

At about 4:00 pm, Cowie turned respondent over to Sergeant Hill (A. 12). Cowie talked to Hill concerning the turning over of respondent to him (A. 15). Cowie first testified that he told Hill that respondent declined to answer any questions and then he testified that he did not tell Hill that at all (A. 16). Then Cowie testified that when he turned respondent over to Hill, he had a conversation with Hill but that he couldn't recall "the exact words verbatim" but that he was turning respondent over to Hill "for further questioning in the Leroy Williams thing" (A. 16). Then Cowie testified that he had not questioned respondent about the Leroy Williams "thing" (A. 16).

Hill testified that he first saw respondent on the day of respondent's arrest in police headquarters at 6:20 pm when Hill went to "get him" for interrogation (A. 21). Hill had conversation with Cowie at about 3:30 pm (A. 22) and Cowie had told Hill that Cowie had talked to both respondent and Smith and Cowie told Hill that respondent "hadn't given any statement at all, I believe he denied implications (sic) or something like this" (A. 23). Cowie had told Hill that he had given respondent his *Miranda* warnings (A. 23).

Hill read respondent his *Miranda* rights at 6:35 pm, respondent indicated that he understood his rights, and respondent signed the rights form (A. 28). Hill then took a statement from respondent; prior to taking this statement, Hill told respondent that "Anthony Smith had al-

ready confessed to this particular crime and had implicated him [respondent]" (A. 28). Hill told respondent that "they were charged with Murder, and I told him that all we had at that time was Anthony Smith's statement, and Anthony Smith said that he was the man with the gun. And I also told him that as far as we know for sure, since we were not there, Anthony Smith might have been the man with the gun" (A. 33).

Hill then testified that respondent had a "[w]hat's the use look on his face" and made a confession of his guilt (A. 33).

Hill testified that he spoke to Anthony Smith between 4:00 pm and 6:35 pm on April 8 at which time Anthony Smith made an oral confession implicating respondent but that a formal written confession was not taken from Anthony Smith until the morning of April 9 (A. 35), whereas respondent's oral confession and written confession were taken at 6:30 pm and 6:35 pm respectively on April 8 (A. 36) in "one continuous action" (A. 29).

It must be noted that Hill testified that Smith "denied that he had robbed the man or touched the man, but he did not deny being there and seeing the man grabbed, or hearing the shot. He did not deny this. But he denied a physical participation in the robbery itself" (A. 37) when Hill spoke to Smith on the evening of April 8 (A. 37). Also Smith "denied pulling the trigger, or planning the robbery, but he did not deny being there and witnessing the robbery" (A. 37).

When Hill was asked whether he thought on the basis of Smith's oral statement on the evening of April 8 that he had a confession from Smith (A. 39), Hill answered

"My answer is no" (A. 40), but Hill did then state that he told respondent that "Anthony Smith confessed and implicated" respondent (A. 40).

Then the court took over the questioning of Hill:

> The Court: Was there any particular reason why you would tell him that if you didn't think the man had confessed?
>
> The Witness [Hill]: Yes, sir.
>
> The Court: What reason?
>
> The Witness: I have done it a lot of times when there has been no confession.
>
> The Court: Yes, but why do you do that? Are you trying to get him to confess by telling him that?
>
> The Witness: I wasn't trying to get him to confess in this instance, but I have done that.
>
> The Court: With that expectation?
>
> The Witness: Yes, sir.
>
> The Court: In other words, you are going to trick him into it?
>
> The Witness: Well, I would tell them their partners have confessed.
>
> The Court: I mean, you are going to trick him into it?
>
> The Witness: To see if he would deny it. No, sir, I don't always tell a prisoner the truth.
>
> The Court: You don't think you should?
>
> The Witness: I would tell him sometimes we have their fingerprints, and we don't have it, or something along this nature.
>
> The Court: All right (A. 40-41).

Respondent testified that at the time of his arrest, he was 18 years old (A. 41). After respondent signed the

rights form given to him by officer Hill, Hill told respondent that Anthony Smith had already made a statement (A. 43) putting everything on respondent (A. 44), and Hill told respondent to go ahead and tell everything and that he might get off light (A. 43), that he was charged with murder in the first degree and that this charge carried life (A. 43) whereas manslaughter carried a maximum of 15 years with the possibility of probation (A. 44) and that Hill would talk to the judge and try to get the charge reduced to manslaughter (A. 43).

In timely manner, prior to trial, respondent moved the trial court to suppress as evidence his confession on the following grounds: (1) respondent's arrest was illegal and, therefore, his confession was the fruit of that illegality; (2) respondent's confession had been coerced because he was not taken before a judge after his arrest without unnecessary delay and that his being taken before a judge was delayed specifically for the purpose of the police interrogating him and that the police did interrogate him during that period for the specific and sole purpose of obtaining incriminating evidence against him; (3) that respondent during custodial interrogation exercised his right to remain silent and that all questioning of him should have ceased and that the renewed questioning of him by Hill was in violation of the rule that all questioning of a prisoner who exercises his right to remain silent must cease; (4) that the rule that all questioning of a prisoner must cease when he exercises his right to remain silent cannot be circumvented by the simple expedient of shuttling him from police officer to police officer; (5) that respondent's confession was obtained through trickery and promises of leniency.

The trial court denied respondent's motion, and on trial, respondent's confession was admitted in evidence, read to

the jury and the written statement of the confession was allowed in the jury room.

Respondent's confession and the testimony of Anthony Smith who was granted immunity for his testimony was the sole evidence against respondent.

The jury returned a verdict of guilty of first degree murder against respondent and the court sentenced respondent to a life term.

Respondent appealed his conviction and sentence as a matter of right in timely manner to the Michigan Court of Appeals, presenting for that Court's review several grounds of alleged error including all of the grounds for the suppression of respondent's confession which respondent had urged in his motion to suppress the confession prior to trial.

Of all of the issues raised by respondent in the Michigan Court of Appeals, the Court reached one and only one issue: Can the requirement of *Miranda* that all questioning of a prisoner cease when he exercises his right to remain silent be circumvented by the simple expedient of shuttling the prisoner from police officer to police officer for further questioning?

The Michigan Court of Appeals answered the question in the negative, reversed respondent's conviction, ordered a new trial and instructed the trial court to suppress as evidence respondent's confession.

Dissatisfied with such ruling, the prosecution applied to the Michigan Supreme Court for leave to appeal to that Court; this application was denied.

This Court granted the People of the State of Michigan a Writ of Certiorari to the Michigan Court of Appeals.

SUMMARY OF ARGUMENT

Respondent's confession was admissible in evidence on trial against him only if it was freely and voluntarily given.

Respondent's confession was not freely and voluntarily given and must be deemed coerced for the following reasons:

1—Respondent had been arrested in violation of his right to be secure in his person from unreasonable seizure. The arresting officer Cowie had neither a warrant for respondent's arrest nor probable cause to believe that he had committed any crime. The sole basis of Cowie's arrest of defendant was a telephone call from a person utterly unknown to Cowie whose voice on the telephone he had never heard before.

2—Respondent's confession was elicited from him while he was being questioned while in police custody at police headquarters with neither an attorney nor any member of his family present. At the time he was 18 years old.

3—Respondent's custodial interrogation was rendered more coercive because during the period of his custodial interrogation from about 2:00 pm to 4:30 pm he could have been taken across the street from the place of his custodial interrogation to a courtroom and before a judge and there be advised of his rights in the premises and offered legal

counsel but the police officer who was interrogating respondent failed and neglected to do this because the officer felt that he didn't have enough information in the case with which to obtain a warrant for the arrest of respondent. This failure by the police officer to take respondent without unnecessary delay before the nearest judicial officer so that respondent could be advised by the judicial officer of his rights was in blatant violation of the prescriptions of Michigan statutory law.

4—A confession which is elicited from a prisoner during a period when he is deliberately withheld from being taken before a judicial officer after his arrest and questioned for the sole purpose of obtaining from him incriminating material with which to support the issuance of a warrant for his arrest is a confession obtained through and by means of coercive measures and is not one freely and voluntarily given.

5—Respondent had a right to remain silent during custodial interrogation. He clearly and unequivocally chose to exercise that right and expressed his choice clearly and unequivocally by stating that he didn't want to answer any questions about robberies.

6—The interrogating officer, Cowie, had the duty to stop his interrogation of respondent; Cowie acquitted such duty. But Cowie had a duty to advise officer Hill when he "turned over" the custody of respondent to Hill that respondent had exercised his right to remain silent.

If Hill had been advised by Cowie that respondent had exercised his right to remain silent, Hill would not have had the right to resume or continue the interrogation of respondent. The fact that Cowie failed and omitted to discharge his duty of informing officer Hill of respondent's exercise of his right to remain silent cannot and does not alter the basic situation: respondent had exercised his right to remain silent and such choice should have been respected by his custodians and all of them.

It is clear that once a person in custody has exercised his right to remain silent, all interrogation of him must cease. The police are not to be permitted to continually seek to interrogate the prisoner after he has once exercised his right to remain silent. This is because such action is *per se* coercive and adds to those pressures already bearing upon the prisoner and serve to overbear his will.

7—This requirement that all interrogation of a prisoner must cease once he had exercised his right to remain silent cannot be circumvented by the simple expedient of the police officer to whom the expression of the exercise of the right to remain silent was made "turning over" the prisoner to another police officer for further questioning without his informing the other police officer that the prisoner had exercised his right to remain silent.

8—It is an additional coercive element in the totality of circumstances for a police officer to approach a prisoner who has exercised his right to remain silent and who has not indicated in any manner that he desires to talk to a police officer to falsely tell the prisoner that another has confessed the crime and implicated the prisoner.

After respondent had exercised his right to remain silent when interrogated by officer Cowie, respondent did not indicate in any manner that he desired to talk to a police officer. It is clear that Hill approached respondent for the specific purpose of eliciting a confession from him. Hill was not honest with respondent. Hill told respondent that Anthony Smith had confessed. Anthony Smith's statements to Hill had not been considered by Hill as a confession. It is clear that Hill told respondent that Anthony Smith had confessed in order to trick respondent.

Respondent was frightened by Hill into making a confession by stating that murder in the first degree carried a life term while manslaughter carried but 15 years and that the choice was up to respondent as to which he wanted to be sentenced under.

When a prisoner has exercised his right to remain silent, the procesution has a very heavy burden to prove that the prisoner waived his right to remain silent while under custodial interrogation and that his waiver was free and voluntary.

CONCLUSION

The prosecution had utterly failed to prove that respondent who had been arrested without warrant and without probable cause and who was not, as required by law, taken without unnecessary delay before a judicial officer to be informed of his right and who was interrogated during the period when he should have been taken before a judicial officer specifically to elicit incriminating statements from him and who exercised his right to remain silent and who thereafter in no manner indicated that he desired to talk

to a police officer and who was falsely told by a second police officer that an alleged accomplice has confessed and implicated him, had freely and voluntarily waived his right to remain silent.

In view of the totality of circumstances attending the elicitation of respondent's confession—including the illegal arrest of respondent, the violation by the police of state law in failing to take respondent without unnecessary delay after his arrest before a judicial officer so that he might be informed of his rights in the premises, the exercise by respondent of his right to remain silent during custodial interrogation, the turning over of respondent by Cowie to Hill without Cowie's informing Hill that respondent exercised his right to remain silent, the renewed questioning by Hill of respondent without respondent's in any manner indicating his desire to talk to a police officer, the confronting of respondent by Hill with a "confession" of a purported accomplice which was not a confession—it cannot be said and should not be said that the prosecution has carried its very heavy burden of proving a free and voluntary waiver by respondent of his right to remain silent.

The decision of the Michigan Court of Appeals which is being challenged herein can be justified and supported by the Michigan Constitution and Michigan statutes and Michigan court decisions, and does not contravene any federal constitutional standard established by this Court. Therefore, the decision should not be disturbed.

ARGUMENT

A.

UNDER THE TOTALITY OF CIRCUMSTANCES—INCLUDING THE ILLEGAL ARREST OF RESPONDENT BECAUSE OF LACK OF PROBABLE CAUSE, THE VIOLATION BY THE POLICE OF STATE LAW IN FAILING TO TAKE RESPONDENT BEFORE A JUDGE WITHOUT UNNECESSARY DELAY AFTER HIS ARREST SO THAT HE MIGHT BE INFORMED OF HIS RIGHTS BY THE JUDGE, THE EXERCISE BY RESPONDENT OF HIS RIGHT TO REMAIN SILENT DURING CUSTODIAL INTERROGATION, THE "TURNING OVER" OF RESPONDENT BY THE FIRST INTERROGATING OFFICER TO ANOTHER FOR PURPOSES OF FURTHER INTERROGATION WITHOUT THE FIRST OFFICER'S INFORMING THE SECOND OFFICER THAT RESPONDENT HAD EXERCISED HIS RIGHT TO REMAIN SILENT, THE CONFRONTING OF RESPONDENT BY THE SECOND OFFICER WITH A "CONFESSION" OF A PURPORTED ACCOMPLICE WHICH WAS NOT A CONFESSION, AND THE AGE OF RESPONDENT OF 18 YEARS—THE PROSECUTION DID NOT CARRY ITS HEAVY BURDEN OF PROVING A WAIVER BY RESPONDENT TO REMAIN SILENT BEFORE A CONFESSION WAS ELICITED FROM HIM.

1. Respondent was Illegally Arrested Because the Arresting Officer had Neither a Warrant for his Arrest Nor Probable Cause to Believe that he had Committed a Crime.

Nothing can be clearer at this point than that respondent was arrested utterly without probable cause in contravention of his rights under the *Fourth Amendment to the Constitution of the United States* and *Section 11, Article 1, of the Michigan Constitution of 1963.*

That an arrest made on the basis of anonymous information does not meet the requirements of the United States

Constitution is made clear by *Aguilar v Texas,* 378 US 108, 84 S Ct 1509 (1964) and *Spinelli v United States,* 393 US 410, 89 S Ct 584 (1969) and that it does not meet the requirements of the Michigan Constitution is made clear by *People v Guertins,* 224 Mich 8 (1923) and *People v Miller,* 245 Mich 115 (1928) and *People v Zeigler,* 358 Mich 355 (1960).

2. Custodial Interrogation is Per Se Coercive.

It has been recognized that the prisoner's being alone in a strange environment in custody of the police and subjected to interrogation for no other reason than to compel him to incriminate himself is *per se* coercive.

> "It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself." *Miranda v Arizona,* 384 384 US 436, 457-458; 86 S Ct 1602, 1619 (1966).

3. Respondent was not Taken by the Police Officers Before a Judicial Officer Without Unnecessary Delay After His Arrest so that He Could be Informed of His Rights by the Judicial Officer in Clear Violation of Respondent's Rights Under Michigan Statute.

Further, it is perfectly clear that respondent could have been taken before a judge after his arrest and between the hours of 2:15 pm and 4:30 pm of the day of his arrest in conformity with the Michigan statute so that he might be informed of his rights by the *judge* and not by a police officer while incommunicado in the hostile atmosphere of a police lock-up, and that he was not so taken before a judge for the reason that the police wanted to question him for the purpose of obtaining information to support the issuance of a warrant for his arrest.

The two Michigan statutes set forth above—*MCLA 764.13* and *MCLA 764.26*—should be compared to *Rule 5(a) of the Federal Rules of Criminal Procedure.*

Of *Rule 5(a),* this Court said in *Miranda v Arizona,* 384 US 436, 86 S Ct 1602, 1622 (1966):

> "Because of the adoption by Congress of Rule 5(a) of the Federal Rules of Criminal Procedure, and the Court's effectuation of that Rule in *McNabb v United States,* 318 US 332, 63 S Ct 608, 87 LEd 819 (1943), and *Mallory v United States,* 354 US 449, 77 S Ct 1356, 1 LEd 2d 1479 (1957), we have had little occasion in the past quarter century to reach the constitutional issues in dealing with federal interrogations. These supervisory rules, requiring production of an arrested person before a commissioner 'without unnecessary delay' and excluding evidence obtained in default of that statu-

tory obligation, were nonetheless responsive to the same considerations of Fifth Amendment policy that unavoidably face us now as to the States. In *McNabb,* 318 US, at 343-344, 63 S Ct, at 614, and in *Mallory,* 354 US, at 455-456, 77 S Ct at 1359-1360, we recognized both the dangers of interrogation and the appropriateness of prophylaxis stemming from the very fact of interrogation itself.[32]

'32. Our decision today does not indicate in any manner, of course, that these rules can be disregarded. When federal officials arrest an individual, they must as always comply with the dictates of the congressional legislation and cases thereunder. See generally, Hogan & Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Geo.L.J. 1 (1958).'"

Writing in concurrence with qualification in *United States v Cooper,* 504 F2d 260, 265 (CADC, 1974), Senior Circuit Judge Fahy, referring to the ruling that a *Miranda* waiver constitutes a waiver of the need to comply with Rule 5(a), opined:

"The ruling referred to I think is clearly inconsistent with the statement in *Miranda, supra,* that '[w]hen federal officials arrest an individual, they must as always comply with the dictates of the congressional legislation and cases thereunder.' In my opinion the ruling is inconsistent also with good reason; it overlooks *the vast difference in these matters between public advice and warning by a magistrate,* with tender of counsel, as required by Rule 5(a), and in-custody, non-public advice and warning, with tender of counsel, by the arresting officers at a police station or FBI office. To equate the two, and to equate a waiver obtained in these different circumstances, would be for me to repudiate the fundamental basis of the Supreme Court's approach

to this problem, namely, the suspect and coercive character of in-custody interrogation."

After observing that the *Miranda* waiver obtained in the *Cooper* case, makes no mention of the duty imposed by Rule 5(a) and thus cannot accomplish a waiver of the requirements of Rule 5(a), Judge Fahy stated:

"Since, in my view, there was a failure of the officers to comply with Rule 5(a), resulting in Cooper not having been warned and advised by a magistrate, with tender of counsel, in the manner required by that Rule and the further applicable subdivisions of Rule 5, set forth, *supra,* I would hold the incriminating statement inadmissible. It cannot be inferred that the statement would have been made had Rule 5(a) been followed. The statement resulted directly from the in-custody interrogation which went forward in the absence of compliance with the requirements of *Miranda* that '[w]hen federal officials arrest an individual, they must as always comply with the dictates of the congressional legislation and cases thereunder.'" 504 F2d at 265.

The fact that respondent in the case at bar had been illegally arrested and was being held in illegal detention and the fact that the arresting officer did not comply with the Michigan states which required that the respondent be taken before a judicial officer without unnecessary delay by the arresting officer is pointed out here because the ultimate question whether respondent waived his right to remain silent should be decided on the basis of "the totality of the surrounding circumstances, including the characteristics of the accused *and the complete details of his detention and interrogation*". *Keiper v Cupp,* 509 F2d 238, 242 (CA 9 1975). (Emphasis added.) Cf *Schneckloth v Bustamonte,* 412 US 218, 93 S Ct 2041 (1973).

4. A Confession Elicited from a Prisoner During that Period When He Could have Been Taken Before a Judge and His Being so Taken was Delayed Specifically for the Purpose of Eliciting a Confession is not Admissible in Evidence.

There are and were at the time of respondent's arrest extant in the State of Michigan the following statutes:

> "A peace officer who has arrested a person for a felony without a warrant must without unnecessary delay, take the person arrested before the most convenient magistrate of the county in which the offense was committed, and must make before the magistrate a complaint, stating the offense for which the person was arrested." *Mich Comp Laws Ann 764.13.*
>
> "Every person charged with a felony shall, without unnecessary delay after his arrest, be taken before a magistrate or other judicial officer and, after being informed as to his rights, shall be given an opportunity publicly to make any statement and answer any questions regarding the charge that he may desire to answer." *Mich Comp Laws Ann 764.26.*

As stated above, it is perfectly clear that respondent could have been taken before a judge after his arrest and between the hours of 2:15 pm and 4:30 pm of the day of his arrest in conformity with the Michigan statute so that he might be informed of his rights by the *judge* and not by a police officer while incommunicado in the hostile atmosphere of a police lock-up, and that he was not so taken before a judge for the reason that the police wanted to question him for the purpose of obtaining information to support the issuance of a warrant for his arrest.

The essence of the quoted Michigan statutes is found in Rule 5(a) of the Federal Rules of Criminal Procedure. This Court said of Rule 5(a) in *Mallory v United States,* 354 US 449, 453-454, 77 S Ct 1356, 1359 (1957), as follows:

> "The requirement of Rule 5(a) is part of the procedure devised by Congress for safeguarding individual rights without hampering effective and intelligent law enforcement. . . .
>
> • • • • •
>
> "The scheme for initiating a federal prosecution is plainly defined. The police may not arrest upon mere suspicion but only on 'probable cause'. The next step in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue or probable cause may be promptly determined. The arrested person may, of course, be 'booked' by the police. But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt."

Of *MCLA 764.13* and *MCLA 764.26* [referred to as sections 13 and 26] and *Rule 5(a),* the Michigan Supreme Court said in *People v Hamilton,* 359 Mich 410, 416-417 (1960), as follows:

> "Said sections 13 and 26, and Rule 5(a) of the Federal rules of criminal procedure, are quite alike and equally mandatory. Each requires that the person arrested be taken 'without unnecessary delay' before a judicial officer for the purposes of complaint and proceedings subsequent thereto.

"This does not mean that an arrested person cannot be 'booked' and questioned for such time of 'brief delay' as presented circumstances fairly require in order to determine the immediate question of release or complaint (*Mallory, supra,* at pages 454, 455 and *Cicenia v LaGay,* 357 US 504, 509, 510 [78 S Ct 1297, 2 L ed 2d 1523]). It does mean that an unnecessary and so unlawful delay of compliance with either of said sections 13 and 26, when done for prolonged interrogatory purposes and without proven justification of the delay, renders *involuntary* and so inadmissible whatever confessional admissions the detained person may have made while so unlawfully detained."

Cowie's failure to take respondent without unnecessary delay before a judicial officer was in violation of the law and his questioning respondent during the period of delay expressly for the purpose of extracting from respondent incriminating statements and the delay being occasioned especially for this purpose, if not rendering respondent's confession inadmissible in evidence, surely increased and augmented the coercive atmosphere of respondent's custodial interrogation and has a heavy bearing upon the question of respondent's having waived his right to remain silent.

5. When a Prisoner During Custodial Interrogation Indicates His Desire to Remain Silent, the Interrogation Must Cease.

This Court has delineated the procedures which must be followed when a prisoner during custodial interrogation exercises his right to remain silent in *Miranda v Arizona, supra:*

"Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." 384 US at 473-4, 86 S Ct at 1627-1628.

6. Once a Prisoner During Custodial Interrogation has Exercised His Right to Remain Silent, all Further Questioning of Him Must Cease.

This Court in *Miranda v Arizona, supra* stated that once a prisoner has exercised his right to remain silent, further questioned further, a heavy burden devolves upon the prosecution to prove that the prisoner waived his right to remain silent:

"If an individual indicates his desire to remain silent, but has an attorney present, there may be some circumstances in which further questioning would be permissible. In the absence of evidence of overbearing, statements then made in the presence of counsel might be free of the compelling influence of the interrogation process and might fairly be construed as a waiver of the privilege for purposes of these statements," Footnote 44, 384 US at 474, 86 S Ct 1627-1628.

"If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel," *Id*, 384 US at 475, 86 S Ct at 1628.

7. Once a Prisoner During Custodial Interrogation has Exercised His Right to Remain Silent, the Requirement that all Questioning of Him Cease Cannot be Circumvented by the Simple Expedient of Shuttling Him Off to Different Police Officers for Further Questioning Without the Succeeding Police Officers Being Told that the Prisoner Exercised His Right to Remain Silent.

Cowie testified that before he questioned defendant after defendant's arrest, he gave defendant his so-called Miranda rights (A. 7). Cowie read the rights to defendant (A.7), and defendant told Cowie then that he completely understood his rights (A. 8) and defendant signed the Miranda rights form submitted to him by Cowie (A. 8).

Cowie questioned defendant about several robberies that had been committed in the lower east side in the

vicinity of Mack and Hillger (A. 9). Defendant declined to answer "(A)nything about the robberies" (A. 13).

Cowie notified Hill that he would like to turn defendant over to Hill for questioning in the Leroy Williams case (A. 10). Cowie testified that he had not questioned defendant on the Leroy Williams case (A. 9, 10).

When defendant declined to answer anything about the robberies to Cowie, it was a decision and expression by defendant to exercise his right under the *5th Amendment to the Constitution of the United States and Article 1, Section 17 of the Michigan Constitution* to remain silent. It then became the duty of the police to absolutely desist from asking defendant any more questions. The fact that defendant was turned over to Hill "for further questioning" and that Hill repeated the *Miranda* warnings to defendant cannot change the duty owed defendant by the police; the requirements of law cannot be circumvented so easily.

Since defendant clearly expressed his decision to exercise his constitutional right to remain silent, and since the police persisted in questioning defendant after he had exercised his constitutional right to remain silent, whatever statements were taken from defendant after he had exercised his constitutional right to silence, must be suppressed as involuntary.

The Court clearly and unequivocally expressed this principle in *Miranda v Arizona*, 384 US 436, 473; 86 S Ct 1602, 1627 (1966):

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in

any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise."

After quoting the above language from *Miranda,* the Court observed, in *People v Tubbs,* 22 Mich App 549, 555 (1970), as follows:

"We conclude that the foregoing reference to the fact that whenever an individual *indicates* his desire to remain silent, the questioning must cease, is a rule to govern *the conduct of the proceedings* and is not the setting out of a special warning requirement."

(First emphasis by the Court; second emphasis added.)

The necessity to guard the spirit and letter of the *Miranda* decision and the right of individuals to exercise their 5th Amendment rights, was clearly expressed in *United States v Crisp,* 435 F2d 354, 357 (CA 7 1970):

"Both the letter and spirit of the Supreme Court's decision in *Miranda* call for condemnation of even this seemingly innocuous police conduct. The procedural safeguards imposed in that case were premised upon the observation that custodial interrogation in the absence of defense counsel is inherently intimidating and destructive of free enjoyment of the constitutional privilege against self-incrimination. To be effective, those safeguards must be fully observed, and the rights of the suspect must be jealously guarded. *Not even the slightest*

circumvention or avoidance may be tolerated. The rule that interrogation must cease, in whole or in part, in accordance with the expressed wishes of the suspect means just that and nothing else. Once the privilege has been asserted, therefore, an interrogator must not be permitted to seek its retraction, total or otherwise. . . .

"From this record, we can only conclude that the inquiry into Crisp's willingness to discuss these matters in the face of his clear statement that he did not wish to discuss any bank robbery amounted to an impermissible attempt to hedge his initial assertion of his right to silence on that matter." (Emphasis added.)

In a situation similar to the case at bar, the Court in *Doss v Bensinger,* 463 F2d 576, 578 (CA 7 1972), stated:

"It is apparent from the fact situation of the case at bar that Doss desired to remain silent notwithstanding continual attempts by the police to interrogate him. Close scrutiny of the testimony at trial with respect to the police officers' persistent inquiries fails to demonstrate a justification for such questioning absent the presence of counsel for the defense. As the Supreme Court indicated in *Miranda v Arizona, supra,* where custodial interrogation proceeds without the presence of defense counsel, the Government bears a 'heavy burden' of demonstrating that the suspect's constitutional rights have been respected."

The Court in *McIntyre v New York,* 329 F Supp 9 (ED NY 1971), adopts the standards of waiver set forth in *Johnson v Zerbst,* 304 US 458, 58 S Ct 1019 (1938), after making the following comment:

> "Once a defendant has asserted his privilege to remain silent a governmental claim of waiver must be scrutinized with special care."

In *Johnson v Zerbst, supra,* the Court said that the courts indulge every reasonable presumption against a waiver and that the Court does not presume acquiescence in the loss of fundamental rights.

In *Mitchell v United States,* 434 F2d 483 (CA DC 1970), the Court said:

> "We recognize that *Miranda* prohibits the inference that a waiver was made simply from the fact that a confession was eventally obtained. (Citations omitted.) Indeed, when the only evidence is that at the start of the interrogation the warnings were given, and at the conclusion of the interrogation a confession had been obtained, courts would do well to require clear evidence of the vital connecting link, i.e., did the interrogated person in fact waive his rights? (Citation omitted.) In the absence of this evidence, *Miranda* is clear that a waiver has not been proven."

And in *United States v Hill,* 340 F Supp 344 (ED Penn 1972), the court said:

> "Thus, when the defendant asserted that he wished to answer no more questions until he had talked to a lawyer, the Secret Service agent was forbidden by *Miranda* any attempt to convince him that he should, in fact, confess. It is true that *Miranda* does not preclude a defendant from subsequently electing to waive his request to terminate uncounseled interrogation, but that election must be reasonably spontaneous."

In the case at bar, the record is entirely barren of any evidence that defendant waived his right to remain silent when Hill began to interrogate him.

After Hill gave defendant the *Miranda* rights again, he immediately told defendant that he had been accused of being the shooter in the Leroy Williams murder. Then Hill told defendant that Smith had confessed and had implicated defendant.

From the foregoing, since defendant had expressed his desire to exercise his 5th Amendment right to remain silent, a knowing, voluntary waiver of his right to remain silent cannot be inferred. What can be inferred is that Hill deliberately confronted defendant with the frightening news that he had been accused of murder and that Smith confessed and made defendant the trigger man with the purpose of shocking the defendant into breaking his silence on the subject. This is evident from the colloquy between Hill and the court where Hill admitted that it was his technique in many cases to tell a person that his partner confessed in order to get that person to confess.

The technique employed by Hill was condemned in similar circumstances in *United States v Barnes,* 432 F2d 89 (CA 9, 1970):

> "Defendants assert that these admissions should have been excluded from their trials on the ground that they were obtained in violation of their constitutional rights; that is, they were made during interrogation which occurred after defendants had refused to answer any further questions about the alleged offenses. . . .

"The evidence in this case is uncontroverted that both Knox and Barnes had specifically indicated that they did not wish to be interrogated further. Each refused to sign a waiver of his constitutional rights and that refusal was noted by the authorities. Thus, the subsequent confrontation with Miss Trosello and the interrogation that followed, for the obvious purpose of getting defendants to abandon their self-imposed silence, *were in flagrant violation of the rule as set forth in Miranda.* We hold that the district courts erred in admitting into evidence the incriminating statements made by the defendants during this illegal interrogation." (Emphasis added.)

In *United States v Hopkins,* 433 F2d 1041 (CA 5, 1970), the Court rejected defendant's claim that his confession should be suppressed because the *Miranda* warnings were not repeated by the second officer who questioned him, the Court finding that unnecessary because the two questionings were one continuous transaction.

"This record pictures an uninterrupted sequence of events beginning with the *Miranda* warnings given by Agent Hanley, including the presence of Hobbs at the third floor interrogation room to take Hopkins to his cell, and culminating with a question on the same matter posed by Hobbs as he and Hopkins returned to the fifth floor. We find that the question of Detective Hobbs was so intertwined with the interrogation by Agent Hanley that Hopkins must have been aware of his constitutional rights with regard to Hobbs' query and, by his answer, Hopkins knowingly waived those rights." 433 F2d at 1045.

It should be kept in mind that Hopkins did not elect to remain silent when Agent Hanley questioned him but answered questions freely.

In the case at bar, we have the reverse of the situation in *Hopkins, supra;* the interrogation of defendant by Hill was so intertwined with the interrogation by Cowie as to be part of it. Hence, the election by defendant to remain silent expressed to Cowie was binding on Hill and it was a flagrant violation of *Miranda* for Hill to ask any further questions of defendant.

This was precisely the point in *Westover v United States,* 384 US 494, 86 S Ct 1638 (1966).

The interrogation of Westover by the city police extended over a long period of time and he had not been informed of his rights. When the city police had finished interrogating Westover, he was "turned over" to the FBI who "on the spot" so to speak, continued the interrogation. The FBI agents gave Westover his rights. But as this Court pointed out, these warnings as to his rights came, from Westover's point of view, at the end of the *entire* process of interrogation, not at the beginning at which time they would have had meaning.

The point surely is that the giving of a warning to a prisoner who has been questioned while in the hostile environment of a police station that he has certain rights is not a magical litany which "sanitizes" or sanctifies all that has preceded and nullifies or assauges to the vanishing point the corecive elements surrounding the interrogation of the prisoner.

To say that the ritual of recitation of rights to the prisoner is an ablution of all coercive acts of the police

is to invite the police to throw the prisoner onto the rack and when his resistance has been stretched to the breaking point, allow them to recite to him his rights and then claim to the court that they have a voluntary confession from the prisoner.

As Senior Circuit Judge Fahy said in dissent in *United States v Poole,* 495 F2d 115, 126 (CADC 1974):

> "Assuming the waivers referred to, the confession itself is not for that reason voluntary—it is simply not inadmissible for non-compliance with *Miranda.*"

Hill denied that Cowie told him that defendant had elected to remain silent. Cowie was equivocal on the point. But that the two police officers talked to one another when defendant was transferred from Cowie to Hill is clear, and it is clear that they talked about Cowie's questioning of defendant. Did not Cowie have a duty to tell Hill that defendant had exercised his right to remain silent?

Or more importantly, did not Cowie have the duty *not* to hand defendant over to Hill for further questioning since defendant had elected to exercise his constitutional right to remain silent?

Whatever view one takes of Cowie's duty in th circumstances, it should be clear that the principle of *Miranda* cannot be circumvented by the police by the simple expedient of shuttling a person from one police officer to another for purposes of questioning and then justify subsequent interrogations after an election to remain silent on the basis that the officer did not know that the defendant had elected earlier to remain silent.

And in *Combs v Wingo,* 465 F2d 96, (CA 6, 1972), the defendant, after having been given his *Miranda* rights said he would make a statement but wanted to talk to an attorney first. The interrogating officer said fine but read to defendant a ballistic report. Thereupon, defendant made an incriminating statement. In granting a writ of habeas corpus, the Court adopted the dissenting opinion of the State Court:

> "The purpose of a question is to get an answer. Anything else that has the same purpose falls in the same category and is susceptible of the same abuses *Miranda* seeks to prevent. The only possible object of showing the ballistics report to the appellant in this case was to break him down and elicit a confession from him. The question was implied if not spoken. Everything was there but a question mark. It was a form of question and got the desired result."

In *Williams v Brewer,* 509 F2d 227, 233-234 (CA 8, 1975), the Court affirmed the district court in the granting of a writ of habeas corpus where the petitioner's confession had been admitted on trial in evidence which was obtained after he elected to remain silent:

> "The facts in this case clearly indicate that the appellee told Detective Leaming several times during the automobile trip to Des Moines that he would tell the whole story *after* consulting with Mr. McKnight [a lawyer]. Despite this indication by appellee that he wished to delay his statement until he had consulted with his attorney in Des Moines, Detective Leaming persisted in his 'conversation' with appellee with the admitted intent of obtaining information before their arrival in Des Moines and

appellee's consultation with his attorney there. By means of a subtle form of interrogation, Leaming did obtain the incriminating statements from appellee."

In *United States v Cooper,* 499 F2d 1060, 1067 (CA DC 1974), the Court said:

> "It seems clear that the weight of authority is that once the suspect, being warned, refuses to sign a proffered waiver without consulting counsel, the custodial interrogation must cease. The interrogation may be validly resumed *only upon the initiative of the suspect,* with a heavy burden upon the United States to establish that fact, failing which a subsequent incriminating statement in answer to resumed interrogation is inadmissible." (Emphasis added.)

In *United States v Clark,* 499 F2d 802, 807 (CA 4, 1974), where the accused had indicated a desire to speak with an attorney but subsequently confessed without consulting with an attorney, the government contending that the accused waived his right to counsel before he confessed, the Court said:

> "Additionally, we note that agent Kenny stated unequivocally that he initiated the interview during which Clark allegedly waived his right to speak with an attorney and confessed. This initiation of the subsequent interview at which the confession was elicited is a factor which, under these circumstances, is a strong indication of involuntariness."

In *United States v Hedgeman,* 368 F Supp 585, 591 (USDC ED Mich 1973), where the accused had indicated

his desire to remain silent but the interrogating agent nonetheless said to the accused that he would be happy to listen to the accused and relay the information to the United States Attorney, the Court said:

> "One who is thus beguiled can hardly be said to have intelligently and voluntarily waived his right to remain silent."

In *Hill v Whealon,* 490 F2d 629, 635 (CA 6, 1974), where it was not clear whether the first interrogating officer had informed the second interrogating officer that the accused had refused to waive his rights, the Court assumed that the second officer was so informed, and the Court went on to quote with approval from *United States v Collins,* 462 F2d 792, 802 (CA 2, 1972):

> "[W]e are agreed that what *Miranda* requires is that 'interrogation must cease' until new and adequate warnings have been given and there is a reasonable basis for inferring that the suspect has *voluntarily changed his mind.*" (Emphasis added.)

But in *Hill v Whealon,* it must be noted that the second officer went to the accused's cell and truthfully told him that a confession had been obtained from the accused's accomplice and then the accused was asked if he wanted to talk about it. When the accused said he might as well, the accused was taken from his cell and then all of his rights were again read to him and the officer told the accused that he could not proceed unless the accused waived his rights and the accused then waived his rights and confessed.

Even if we accept the holding in *Hill,* the facts in the case at bar do not parallel those in *Hill* because in the

case at bar, assuming that Officer Hill had been informed by Cowie of respondent's decision to remain silent, officer Hill first advised respondent of his rights and then sprung on him the news, that Anthony Smith supposedly confessed.

Surely, at the very least, officer Hill should have followed the procedure of first informing respondent of what Anthony Smith supposedly said and then asking respondent if he wanted to discuss the matter and if he got an affirmative response, then to warn the respondent that he had a right to remain silent.

8. A Confession Obtained by Trick is not a Voluntary Confession if Other Coercive Elements are Present.

This Court has said that when a confession is obtained by trick it is evidence that the confessor did not voluntarily waive his right to remain silent.

> "Moreover, any evidence that the accused was threatened, *tricked,* or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." *Miranda v Arizona,* 384 US at 476, 86 S Ct at 1629. (Emphasis added.)

Of course, the falsehood that Hill told respondent does not render respondent's confession in and of itself involuntary, but it is a factor to be considered in the totality of circumstances.

> "The fact that the police misrepresented the statements that Rawls had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible." *Frazier v Cupp,* 394 US 731, 739, 89 S Ct 1420, 1245 (1969).

It has been recognized that the methods used by Hill in interrogating respondent were designed to trick him into giving up the exercise of his constitutional rights.

> "From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at time relentless questioning, are employed. To obtain a confession, the interrogator must 'patiently maneuver himself or his quarry into a position from which the desired objective may be attained.' When normal procedures fail to produce the needed result, the police may resort to deceptive strategems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights." *Miranda v Arizona,* 384 US at 455, 86 S Ct at 1617.

Compare the situation in the case at bar with that in *State v Watson,* 487 P2d 197 (N Mex 1971), where the detective said to defendant "Now look John, we can go to trial with one state witness and one defendant or two defendants . . ." This language was held to be an implied promise, and even though *Miranda* warnings were given, the confession was held to involuntary because of the implied promise.

Apart from that consideration, the mere confrontation of defendant with the statement that defendant's purported partner had confessed and put the entire onus of guilt on defendant, was coercive because it raised a fright in defendant that he would be left to bear the heavy burden of a charge of murder in the first degree with all against him. Defendant testified that he was afraid when Hill told him of Smith's statement.

A like situation was considered by the Court in *Bram v United States,* 168 US 532, 18 S Ct 183, 194 (1897), and the Court found the defendant's statement to be involuntary:

> "It cannot be doubted that, placed in the position in which the accused was when the statement was made to him that the other suspected person had charged him with crime, the result was to produce upon his mind the fear that, if he remained silent, it would be considered an admission of guilt, and therefore render certain his being committed for trial as the guilty person; and it cannot be conceived that the converse impression would not also have naturally arisen that, by denying, there was hope of removing the suspicion from himself. If this must have been the state of mind of one situated as was the prisoner when the confession was made, how, in reason, can it be said that the answer which he gave, and which was required by the situation, was wholly voluntary, and in no manner influenced by the force of hope or fear? To so conclude would be to deny the necessary relation of cause and effect."

Compare the situation in *Everette v Murphy,* 329 F2d 68 (CA 2 1964):

> "From the uncontroverted evidence, however, it is established that Everette was arrested illegally, held incommunicado and questioned extensively without counsel or warning of his right to counsel or his right to remain silent, and the confession followed upon deception and false promises of assistance if he should confess. . . . The deception of Everette as to Finocchiaro's survival of the attack might be ignored if it stood alone. (Citation omitted.) However, here it was used to make more plausible the promise of assistance to induce confession. (Citation omitted.) A confession induced by police falsely promising assistance on a charge far less serious than the police knew would actually be brought is not to be considered a voluntary confession."

The standard to be applied in judging the actions of the police in the case at bar is that set forth in *Rogers v Richmond,* 365 US 534, 544; 81 S Ct 735, 741 (1961):

> "And this is not a permissible standard under the Due Process Clause of the Fourteenth Amendment. The attention of the trial judge should have been focused, for purposes of the Federal Constitution, on the question whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner's in fact spoke the truth."

B.

A STATE COURT DECISION SHOULD NOT BE OVERTURNED BY THE COURT IF IT CAN BE JUSTIFIED UNDER STATE LAW AND THE DECISION DOES NOT CONTRAVENE CONSTITUTIONAL STANDARDS SET BY THIS COURT.

The Constitution of the State of Michigan vouchsafes an accused in a criminal matter a right that he not be compelled to incriminate himself, and such right was vouchsafed by the constitutions of the State of Michigan since 1850. The law of the State of Michigan for many decades has prescribed that no confession shall be admitted in evidence unless the prosecution shows first that it was given by the accused freely and voluntarily and that no confession could be regarded as having been freely and voluntarily given unless the police interrogator first, before questions designed to elecit a confession were propounded, advised the accused that he had a right to remain silent and that whatever he said could and would be used against him in a court of law.

The enunciation of the principles in *Miranda* by this Court can be said from a certain point of view to have been a discovery of certain attributes of the ideal principle of prohibition of compelled self-incrimination in criminal proceedings which always inhered in that principle and only waited for an articulation by some court. The principle that an accused in a criminal proceeding could not be compelled to incriminate himself was neither invented nor discovered by the framers of the federal constitution; it had been promulgated in the ecclesiastical and civil courts of England and was embodied in the constitutions of some of the original colonies before being written into the Bill of Rights of the federal constitution.[1]

[1] See VIII Wigmore on Evidence (McNaughton Revision) Chap 80, Privilege Self-incrimination, p 266.

Although the Fifth Amendment to the Constitution of the United States and its guarantees and proscriptions are binding on the individual states as interpreted by this Court and particularly in *Miranda,* it is not to say that the courts of the State of Michigan cannot and have not adopted the principles enunciated in *Miranda* as attributes of the right against self-incrimination as embodied in the Constitution of the State of Michigan.

There is no principle of federal law which prohibits a state court from adopting a rule of law promulgated by a federal court as reflective of federal constitutional law and regarding that rule as part of the state's constitutional law and then grafting onto that rule further standards which are higher or more stringent than the federal court chooses to adopt to its rule.

Therefore, the Michigan courts are free to hold that the rule proscribing any further questioning of an accused who is in custody after he had declared his intention to exercise his right to remain silent cannot be circumvented by the simple expedient of shuttling the accused from officer to officer without the succeeding officers being informed of the fact that the accused has exercised his right to remain silent.

And unless it is absolutely clear that such holding cannot be based upon Michigan constitutional provisions and Michigan statutes and case law, then this Court should not interfere with such holding on the basis that it reflects a higher standard than adopted by this Court.

If the rule adopted by the Michigan court and purporting to reflect principles of Michigan constitutional law and statutes and case law contravene rules and standards es-

tablished by this Court as reflecting constitutional rights and guarantees of the federal constitution which are binding on the states, then this Court has a right to overturn such rule, but if not, not.

See *Oregon v Hass,* — US —, 95 S Ct 1215, 1222-1223-1224 (Mr. Justice Marshall, dissenting) (1975).

CONCLUSION

Under the totality of circumstances, the prosecution has not carried its heavy burden of proving that respondent voluntarily waived his right to remain silent during custodial interrogation.

This Court should affirm the decision of the Michigan Court of Appeals.

Respectfully submitted,

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Dated:

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-653

STATE OF MICHIGAN,

Petitioner,

vs.

RICHARD BERT MOSLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MICHIGAN

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE, AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONER, OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.

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STATE OF MICHIGAN,

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Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER.

Americans for Effective Law Enforcement, Inc. respectfully moves this Court for leave to file a brief, *amicus curiae*, in support of the petitioner in the instant case. This motion is made pursuant to Rule 42 of the Supreme Court Rules. The petitioner has consented to our filing; the respondent has not responded to our request for consent to file. Accordingly, we are moving the Court directly for leave to file. A letter from counsel for the petitioner has been filed with the Clerk of this Court. The interest of the *amicus curiae* and our reasons for desiring to file are set forth below.

INTEREST OF THE AMICUS CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE) is a national not-for-profit citizens organization incorporated under the laws of the State of Illinois As stated in its by-laws the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness to deal with crime.

The interest of *amicus* in the instant case stems from the importance of the issue involved, the resolution of which will have a direct and material impact upon the effectiveness of law enforcement, nationwide. The issue in this case to which *amicus* addresses itself concerns the permissibility of law enforcement officers questioning a suspect after he has once invoked his Fifth Amendment privilege to remain silent under *Miranda* v. *Arizona,* 384 U. S. 436 (1966).

Many lower courts have construed the language in *Miranda* prohibiting further questioning after the invocation of the privilege as an absolute bar to any subsequent interrogation whatsoever, thus denying to the police the use of one of the most essential tools in criminal investigation. Such a rigid interpretation has an obvious adverse impact on the enforcement of the criminal law. Other lower courts have enunciated a more flexible standard involving subsequent questioning after the privilege has been invoked. The instant case presents this Court with the opportunity to resolve this conflict in the lower courts and, as a consequence, the outcome of the case will be of extreme importance to law enforcement nationwide.

Therefore *amicus* respectfully moves this Court for leave to file this brief.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-653

STATE OF MICHIGAN,

Petitioner,

vs.

RICHARD BERT MOSLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MICHIGAN

BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONER OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC.

ARGUMENT.

I.

THE RIGIDITY OF THE LANGUAGE IN MIRANDA v. ARIZONA HAS, IN MANY CASES, COMPELLED LOWER COURTS TO SUPPRESS CONFESSIONS AND TO REVERSE THE CONVICTIONS OF FACTUALLY GUILTY DEFENDANTS, DESPITE THE FACT THAT BY ANY OBJECTIVE STANDARD SUCH CONFESSIONS WERE VOLUNTARILY MADE.

One of the common threads which runs through the three opinions of the four dissenting justices in the case of *Miranda* v. *Arizona*, 384 U. S. 436 (1966) is a sharp criticism of the

absolute rigidity of the mandate of the majority opinion's restrictions upon the essential law enforcement technique of interrogation of criminal suspects.[1]

Thus, Mr. Justice Clark, dissenting, cautioned the majority against the adoption of such "doctrinaire rules." 384 U. S. at 501. Mr. Justice Harlan, dissenting, characterized the action of the majority as being "heavy-handed and one-sided," 384 U. S. at 525. Mr. Justice White, dissenting, described the majority rule in *Miranda* as ". . . a deliberate calculus to prevent interrogation . . .," 384 U. S. at 541. These justices were making the obvious point that, in an area as volatile as the enforcement of the criminal law, the Supreme Court of the United States should not engage in "doctrinaire" or "heavy-handed" pronouncements, particularly where such rulings have neither a basis in Constitutional theory nor in practical reality.

This is precisely what the majority in *Miranda* did, however. The apparent reasoning of the majority has been succinctly described by a qualified observer, Mr. Fred P. Graham, an attorney and the then Supreme Court reporter for the *New York Times*. In his book "The Self-Inflicted Wound"[2], Mr. Graham describes the decisions of the Supreme Court of the United States dealing with the criminal law during the decade of the 1960's. Mr. Graham, who is, incidentally, liberally oriented and basically sympathetic to the "Warren Court's" criminal law decisions, had this to say with regard to the attitude of the majority of the Court in the *Miranda* case:

> This was the core of the Supreme Court's difficulties over *Miranda*—in order to abolish the abuses that cropped up in some but by no means all police investigations, it would have to condemn the "voluntariness" approach which

1. Dissenting opinions of Clark, J., 384 U. S. 436 at 499; Harlan, J., in which Stewart and White, J. J. joined, 384 U. S. 436 at 504; and White, J., in which Stewart and Harlan, J. J. joined, 384 U. S. 436 at 526.

2. Graham, "The Self-Inflicted Wound," The McMillan Company, 1970.

> the Court itself had always approved before and which the police saw as a reasonable way to do their job. If the Court were to frame a prophylactic procedure rigid enough to rule out all of the abuses that the voluntariness approach could permit, *it would also outlaw many instances of reasonable, noncoercive police inquiry about crime.* (Emphasis supplied.)[3]

* * * * *

> Also where the previous landmark decisions had imposed rigid but narrow restrictions on state officials conduct, *Miranda* was to lay down a statute-like code of procedure consisting of four commandments, some of which included sub-commandments.[4]

* * * * *

> Despite the Court's zig-zag course, its trend was clear; it would continue to cast about for an objective standard by which police conduct could be regulated and if the standard proved so rigid that the police could not interrogate at all, that would be a tolerable outcome in [the majority of] the Warren Court's eyes.[5]

Thus have members of this Court and a qualified and objective observer characterized the rigidity of the commands of the *Miranda* decision.

This case presents squarely to this Court the interpretation of that part of the majority opinion in *Miranda* which provides in part that:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in custody interrogation

3. *Ibid.* p. 156.
4. *Ibid.* p. 158.
5. *Ibid.* p. 159.

> operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. 384 U. S. at 473-474.

This is the language from *Miranda* cited by the lower court in the instant case as the substantive basis upon which its decision was predicated.

The admonition continues, in the same vein and, we believe, equally relevant to this case:

> If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent. 384 U. S. at 474.

These passages, we submit, typify, perhaps more than any other passages in the opinion, the rigidity, the doctrinaire quality, the heavy handedness and one-sidedness of the majority opinion. They are replete with categorical absolutes. If the suspect indicates "in any manner", "at any time" that he wishes to remain silent, then the investigation "must" cease. Likewise, if he indicates that he wants an attorney, questioning "must" cease until the attorney is present and the attorney "must" have the opportunity to be present during questioning. The command is seemingly made absolute: the refusal to speak or the request for counsel forecloses the right of the police to interrogate criminal suspects.

Certainly many lower courts, including the one in the instant case have treated the foregoing language as absolute, with the result that, in many cases, confessions which are by every standard of logic and common sense voluntary and reliable, have been suppressed, and convictions which would have been upheld without question under pre-*Miranda* standards have been reversed. The truth of the matter—the question of the actual guilt or innocence of the accused—becomes irrelevant.

One lower court has characterized the situation resulting from the rigidity of the *Miranda* dictates with admirable candor. In *United States ex rel. Chabonian* v. *Leik, Director,* 366 F. Supp. 72, E. D. Wis. (1973), the court in granting the petitioner habeas corpus relief,[6] interpreted the dictate of *Miranda* that questioning must cease once an attorney is asked for most strictly against the government. In the course of its opinion the court noted that the pre-*Miranda* standard for the admissibility of confessions was that of voluntariness but that the focus of the Supreme Court had:

> ". . . been broadened from protecting the *innocent* from the possibility of a false confession to protecting the *guilty* from unfair methods of procuring statements from him. 366 F. Supp. at 76 (Emphasis supplied).

This, we submit, is the crux of the entire matter. The law and the teachings of this Court have always been directed towards the protection of the innocent from truly unfair or coercive methods of interrogation through the application of the Due Process clause of the Fifth and Fourteenth Amendments, even though a by-product of that commendable concern may result in the acquittal of guilty defendants. *Brown* v. *Mississippi,* 297 U. S. 278 (1936); *Haynes* v. *State of Washington,* 373 U. S. 503 (1963). No one, certainly not *amicus* in this case, should quarrel with this principle. In *Miranda,* however, the sheer rigidity of its "doctrinaire" and "heavy handed" dictates of the opinion have resulted in the protection only of the *guilty* because police methods of interrogation which are *not* unfair or coercive in the least by any objective standard have been made so by the inflexibility of the *Miranda* opinion.

Following are concrete examples of this, taken from recent appellate cases which deal with those provisions of *Miranda* which purport to foreclose any interrogation once a refusal to speak is made or an attorney is asked for:

—Case No. 1 *People* v. *Milton,* 75 Cal Rptr. 803, Court of Appeal of California (1969).

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6. Title 28 U. S. C. No. 2241 *et seq.*

Defendant, when arrested for the murder of his wife was given the proper *Miranda* advisements by the arresting officer, at which time he stated that he did not wish to make a statement. Some two hours later a detective, who was apparently unaware of the previous warning and refusal to make a statement, again properly advised the defendant of his rights, whereupon the defendant made admissions which were inconsistent with his later trial testimony. The appellate court held that the admissions should have been excluded. Defendant's murder conviction was thus reversed, *despite the fact that the second interrogator was unaware of the first refusal and that the admissions made at the second interrogation were apparently voluntary.*

—Case No. 2 *Scott* v. *State,* 475 S. W. 2d 699, Supreme Court of Arkansas (1972).

In reversing the defendant's conviction for the rape of a two-year-old girl, the court noted in this case that there were no eyewitnesses to this crime, as the victim was too young, and the only other witness, her father, had been killed in an automobile accident. Defendant was properly advised and refused to make a statement. Then, according to the Court: "About three months later a deputy sheriff who was passing the cell where Scott was confined asked him, in the course of what appears to have been a bantering conversation, if he had raped the little girl. Scott replied, 'yeah'."

This statement was held invalid as not being voluntarily made under *Miranda* and the rape conviction was reversed.

—Case No. 3 *U. S. ex rel. Chabonian* v. *Leik, Director,* 366 F. Supp. 72, E. D. Wis. (1973).

Defendant had been convicted of receiving and having in his possession a stolen car. He was advised of his rights under *Miranda* on three different occasions; he asked for counsel after his arrest and counsel was provided. Defendant, his father, his attorney, two detectives, a state's witness, and his attorney were in a hallway of the Safety Building going back and forth between the office of the district attorney and the issuing magistrate.

All of the group of seven were not in earshot of each other at any given time, but apparently defenadnt's attorney was physically present at all times relevant. A detective remarked to defendant's *father* that ". . . he should talk to his son because his son was on probation now and if he didn't tell the truth, he was going to be hurt by it." Later, on one of the back and forth trips, defendant told one of the detectives ". . . that he knew the automobile was stolen." The United States District Court held the statement inadmissible because the state had failed to prove a knowing waiver of the right to the presence of counsel.

—Case No. 4 *United States* v. *Clark,* 499 F. 2d 802, 4th Cir. (1974)

Defendant was arrested for bank robbery, was twice advised of his rights and each time declined to make a statement, whereupon questioning ceased both times. Some three hours later FBI agents, while fingerprinting defendant, confronted him with the statements of an accomplice, again advised him of his rights, and asked him for a statement. No coercive tactics were used although one of the FBI agents testified that he told defendant that it would be better for him to tell the truth. At this point the defendant made a verbal inculpatory statement.

The court held this statement inadmissible, finding that the defendant had made no voluntary waiver of his rights.

—Case No. 5 *State* v. *Lachapelle,* 308 A. 2d 467, Supreme Ct. R. I. (1973).

Defendant had been arrested for murder. He was advised of his rights and requested an attorney. While waiting for the attorney to arrive defendant remarked to an officer: "I'm really in a jam this time" and inquired as to what would happen to him. The officer replied that he did not know and then asked defendant why he had used a knife on the victim. Defendant replied that he had a "beef" to straighten out. The

officer then asked defendant what he had done with the knife and defendant told him.

On appeal these statements were held to be inadmissible.

—Case No. 5 *Commonwealth* v. *Mercier*, 302 A. 2d 337, S. Ct. Pa. (1973).

Defendant arrived voluntarily at the police station with his mother and sister in response to a murder investigation. He was advised of his rights and requested the assistance of counsel. Questioning ceased, but the detectives read to him a statement of an accomplice which implicated him. Defendant then conferred with his family for at least 30 minutes and then after additional advisements agreed to take a polygraph test and made a confession as to his involvement.

The court held that no voluntary waiver of rights was made and that the confession was inadmissible.

These are examples of cases in which the rigidity of the language from *Miranda* quoted above at pp. 3-4 forced lower courts to suppress confessions which by any objective standard appear to be completely voluntary. In none of the cases were coercive tactics used which would indicate that the will of the suspect was overborne, and in every case it was conceded that proper advisements were given, often many times over.

We submit that *but for* the rigidity of the prohibition against *any* subsequent questioning the lower courts would almost certainly have found all of the statements made to have been voluntary and in each case the defendants were found at trial, to have been guilty. Thus we see the situation in which the "doctrinaire" and "heavy handed" dictates of *Miranda* have served as a shield *only* for the guilty, and not from unfair or oppressive police tactics, but rather from good-faith, non-coercive efforts of law enforcement officers to investigate crimes.

This case presents this Court with a vehicle whereby it can relax the rigidty of the *Miranda* decision with regard to the admission of statements made subsequent to the giving of the

required warnings and a refusal to speak or a request for an attorney. As will be discussed in the next section of this argument there is a substantial body of law which takes a far less rigid view of the provisions of *Miranda*, and which applies to the case at bar. As the foregoing examples demonstrate, however, there are still many lower courts which apply *Miranda* in its most inflexible form. They apparently feel that they have no choice but to do so.

The two lines of cases create an obvious conflict. We urge this Court to resolve this conflict in favor of a realistic concern for the needs of law enforcement, which can be met without doing the slightest violence to basic Fifth Amendment rights, and against the contrived protections of the rights of the guilty which the language of *Miranda* purports to dictate.

II.

THIS COURT SHOULD PROMULGATE A RULE OF REASON TO GUIDE LOWER COURTS IN ASSESSING THE VOLUNTARINESS OF CONFESSIONS OF OTHER STATEMENTS MADE AFTER MIRANDA WARNINGS HAVE BEEN GIVEN AND A REFUSAL TO SPEAK OR A REQUEST FOR AN ATTORNEY HAS BEEN MADE.

Despite the inflexibility of the dictates of the majority in the *Miranda* decision which seemingly foreclose *any* interrogation once an individual has been advised of his rights and has invoked the privilege by refusing to speak or by requesting an attorney, a substantial body of law has grown up which has applied a test of reasonableness to police conduct in the course of subsequent interrogations.

As was noted in Section I of this argument, there is an obvious tension between this body of case law and the previously described cases in which the dictates of *Miranda* have been applied as absolute prohibitions against any sort of subsequent interrogation. This case presents to this Court an opportunity

to resolve this tension and we urge it to resolve the question in favor of the rule of reason.

The fact is, of course, patent, that this Court and only this Court can resolve the conflict *definitively* because *Miranda* was decided on the basis of the Fifth and Sixth Amendments to the Constitution of the United States. This underscores the importance of the instant case, for there is very definitely a split of authority throughout the nation on this issue.

The rule of reason approach can be found in those cases which have held that there can be a subsequent interrogation and a request to a suspect to reconsider his prior invocation of the privilege so long as unwarranted pressures are not put upon him to talk after he has refused to speak or has asked for an attorney.

What the lower courts consider to be unwarranted pressures may be found in those cases in which a subsequent interrogation has been upheld as not violative of *Miranda* because the police kept the defendant advised of his rights and did *not* engage in tactics as:

—". . . prompting, cajoling, harassment, threats or inducements . . ." *Hill* v. *Wheaton, Sup't.* 490 F. 2d 629, 6th Cir. 1974.

—". . . continued importunity or coercive interrogation in the guise of a request for reconsideration." *People* v. *Gary,* 31 N. Y. 2d 68, Ct. App. N. Y. (1972).

—refusing "to take 'no' for an answer" and continuing "to question, harass and coerce the defendant to cast aside his desire to exercise his right to remain silent." *People* v. *Naranjo,* 509 P. 2d 1235, (1973).

—". . . persistent police exhortations . . ." *People* v. *Pittman,* 302 N. E. 2d 7, S. Ct. Ill. (1973).

—employing "techniques of persuasion or inducement." *Holloway* v. *U. S.,* 495 F. 2d 835, 10th Cir. (1974).

The rule of reason is perhaps best summarized by the statement of the court in *U. S.* v. *Collins,* 462 F. 2d 792, 2d Cir. (1972). In that case the defendant was interrogated on six different occasions over a 24-hour period and was advised of his rights prior to each interrogation. Defendant exercised his rights on five occasions and interrogation ceased. On the sixth occasion he confessed. The court held that the statement was admissible, and that no *Miranda* violation took place despite the officers' efforts to make Collins reconsider his refusal to talk, stating:

> So long as such reconsideration is urged in a careful, non-coercive manner at not too great length and in the context that a defendant's assertion of his right not to speak will be honored, it does not violate the *Miranda* mandate. 462 F. 2d at 796.

See also: *Massimo* v. *U. S.,* 463 F. 2d 1171, 2nd Cir. (1972).

We have not attempted in this section to deal exhaustively with the law on the subject, as this has been done by the State of Michigan in its brief in chief. We have merely attempted to define the two bodies of conflicting case law which the instant case presents to this Court for resolution.

We urge, again, that this Court adopt the rule of reason approach just described and decide this case accordingly. The Court has not been reluctant, in the past, to set limits on the over rigid requirements of the *Miranda* decision. *Harris* v. *New York,* 401 U. S. 222 (1971); *Lego* v. *Twomey,* 404 U. S. 477 (1971); *Michigan* v. *Tucker,* 417 U. S. 433 (1974); *Oregon* v. *Hass,* .... U. S. ...., 43 L. W. 4417, (1975). We believe that this case presents a similar opportunity for the following reasons:

1. As in the cases noted in Section I it is highly likely that, but for the rigidity of the passage from *Miranda* cited by the lower court as authority for its position, Mosley's confession would have been admissible.

2. There is no evidence in the record that any coercive tactics were used on Mosley. To the contrary, it is conceded

that he was given proper *Miranda* warnings on both occasions on which he was questioned; thus it is apparent that the officers involved acted in good faith, as was the case in *Michigan* v. *Tucker*, supra.

3. If this Court reverses in the instant case and follows the rule of reason as enunciated by the lower court cases described in this section of our argument, no violence will have been done to fundamental Fifth Amendment rights because even in the "rule of reason" cases described the police will not be permitted to use coercive tactics or to importune criminal suspects into confessing. *United States* v. *Collins*, supra.

4. Lower courts will not be forced to reverse conviction for serious crimes in which, as in the instant case, the factual guilt of the defendant, as found by a jury, is evident.

We submit that the foregoing reasons should convince this Court to follow the rule of reason approach of the lower courts, as exemplified by the cases cited in this section, to the issue presented in this case.

CONCLUSION.

Lower courts have differed greatly in their interpretation of the language in *Miranda* which purports to forbid any subsequently questioning of suspects who have once invoked their Fifth Amendment privilege. Many courts have construed the language as an absolute prohibition on subsequent questioning and have, as a result, suppressed confessions that were otherwise completely voluntary. Other courts have applied a rule of reason, permitting subsequent questioning so long as coercive tactics were not used and the will of the suspect was not overborne.

Amicus submits that the latter interpretation is the proper one given the fact that interrogation of criminal suspects is an absolutely essential law enforcement technique and that the more rigid interpretation serves only to protect the guilty. We urge this Court to reverse in the instant case.

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